Abraham Lincoln and the Supreme Court

Excerpts from newspapers and other sources

From the files of the

Lincoln Financial Foundation Collection

Washington D.C.
Jany 21 1862.

R. W. Thompson Esqr

Dear Sir:

Should Trumbull's bill for the reorganization of the Supreme Court become a law, it is arranged that Smith shall be the Justice for our circuit, Browning for the Illinois circuit court, and I think Chase will be appointed to the Ohio circuit, I suspect that the cabinet will be entirely reformed. for it now appears that Fremont will be restored in triumph over the Blairs; Jessie has produced some fifteen of their letters which it is said overwhelm them all. they call for higher prices for their friends, speak disrespectfully of Lincoln, and are full of lofty ambition. I therefore suspect that Blair may have to go too. however we shall know all in a few days when the report of the committee is made.

It may be that that Trumbull's bill will not pass. and opposition may arise from the fact that the places are filled in

advance, and will not be surprised if
Trumbull himself finally opposes the bill
to defeat the combinations made.
But if [it] this pass, and Chase goes upon
the bench then it is probable that Judge
Davis of Illinois will be called to fill
his place, which will be very well, for he
is honest & capable, and a true friend
of Lincoln, which he has not yet had
about him:
The Interior department I desire shall
continue to be filled by an Indianian, and
as Colfax & his friends made so strong
a fight for him, Lincoln, I suspect will
first turn to him, now he will not
suit us as well as some others would,
and I would like to have you have
the place if you incline to it, and will be
glad to aid you what I can, though I cannot
say to what extent my influence may go, you
have a better idea than myself, its extent,
some of my very partial friends here
have suggested that I should stand in for
the position, but I assure you I have
no ambition that way and recoil from
the conflict, which if successful must
be accompanied with many mortifying
incidents, but I have agreed that if you

determine to decline to make an effort for the position for yourself, and think after careful reflection of the whole subject, that this position is important in any respect that I should try to get it, I will with your aid try to get it. It appears to me quite presumptuous to engage in such an undertaking on my own account, but when I reflect that I may without arrogance believe that I am as competent as some of the incumbents, and think it is such position to be more dishonorable to fail the effort in the undertaking.

I shall be home in a few days, but may remain long enough to hear from you, and if you consent to have your name used in connection with the position write to me & I will do all I can to set you afloat to the best advantage, in which event I think you had better come on & do what you can for yourself.

I have nothing further from the Chirurgeon, the whole affair is before the Board upon a report written by Mr. A. Thompson which he hopes the Board will adopt as his own.

Dick left yesterday for Kansas with D.H. Lane, for the purpose of putting the Indians in the field, but I suspect when you see the list of Commissions & Generalships

for that army you will think some other and to the push on the field with the hope of a harvest, but I suppose it may well there as any other. The war will never end as long as there is any thing to steal.

Three days since I thought there would be a general battle by this time. I do not know or have any reason to think now that there will ever be any battle in this vicinity. There is only one thing that now appears to be certain, and that is that there is no danger of a Military despotism growing out of the Military action or heroism of Genl McClellan, no one is likely to run crazy after him.

Truly yours

J. P. Usher

LINCOLN CENTENNIAL ASSOCIATION

Bulletin

BULLETIN NO. 8 SPRINGFIELD, ILLINOIS SEPT. 1, 1927

LINCOLN IN THE UNITED STATES COURT 1855-1860

New Light on His Law Practice

Elsewhere in this Bulletin mention is made of the discovery, in the course of work on "Lincoln in the Year 1858," of a large number of Lincoln legal papers in the files of the U. S. Circuit Court at Springfield. These papers are of all kinds, ranging from precipes written on small slips of paper to declarations and bills of complaint many pages in length. Taken as a whole, they furnish important information on one phase of Lincoln's legal work. They are of particular value because, with the exception of Lincoln's work in the state Supreme Court, almost all our knowledge of his professional life is derived from the belated reminiscences of a few associates.

Lincoln was admitted to practice in the Circuit and District Courts of the United States in 1839, upon the removal of those courts from Vandalia to Springfield. At that time, and for sixteen years afterward, all of Illinois formed but one judicial district. In 1855, however, the state was divided into two parts; a northern district with a seat at Chicago, and a southern district

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BULLETIN NO. 8

Contents

LINCOLN AS A WAR EXECUTIVE

Two Recent British Estimates

The Military Genius of Abraham Lincoln. By Brigadier General Colin R. Ballard. London, 1926.

Statesmen and Soldiers of the Civil War. By Major General Sir Frederick Maurice. Boston, 1926.

Reviewed by
JOHN MCAULEY PALMER
Brigadier General, U. S. Army, Ret.

About thirty years ago, General Lord Wolseley, in an introduction to Colonel Henderson's Life of Stonewall Jackson, wrote the following criticism of Abraham Lincoln's conduct of the Civil War:

"In the first three years of the Secession War when Mr. Lincoln and Mr. Stanton practically controlled the movements of the Federal forces, the Confederates were generally successful. . . . . The Northern prospects did not begin to brighten until Mr. Lincoln in 1864, with that unselfish intelligence which distinguished him, abdicated his military functions in favor of General Grant."

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Until recently this has been the orthodox view in America as well as England. According to this view, Abraham Lincoln prolonged the war because for three years he interfered with the plans and initiative of his professional military subordinates. When after three years, he discontinued this silly practice, the military commanders were at last free to develop the superior resources of the North and bring the war to a victorious conclusion.

Neither General Ballard nor General Maurice concur in this view. The former after quoting General Wolseley's dictum as given above, says:

> "With these words I disagree most emphatically. To begin with there is a mistake of facts; the northern prospects began to brighten with Gettysburg and Vicksburg, long before Lincoln 'abdicated'; the first five months of Grant's reign were anything but bright."

The whole book proves that in McClellan and the rest of Grant's predecessors there was no general competent to be entrusted with the command-in-chief of the Federal armies. President Lincoln delegated his constitutional power and responsibility at the very first favorable opportunity.

Says General Maurice, in his preface to "Statesmen and Soldiers of the Civil War":

> "I had long been dissatisfied that the judgments of Lord Wolseley and Colonel F. R. Henderson, written by the former on incomplete information, and by the latter in a study of one part only of the Civil War, should stand as the British military criticism of a great statesman. When I studied again in the light of my own experience in the Great War, the relations between Lincoln and McClellan and between Lincoln and Grant I became more than ever convinced that if, instead of holding up Lincoln's action in May, 1862, as an example of how not to interefere with soldiers, we had made a closer study of the workings of his mind and the processes by which he evolved a system for the conduct of war, we should have saved ourselves much painful labor in the Great War."

The two foregoing quotations from the authors under review give a sufficient indication of their viewpoint. In "The Military Genius of Abraham Lincoln," General Ballard fully justifies the remarkable title of his book. In "Statesmen and Soldiers of the Civil War" one finds a historic demonstration of the relations that should subsist between the supreme civil authority and the military commander in the democratic state.

General Ballard points out that Lincoln should be criticized primarily from the standpoint of what the British call the "Higher Command," that is, the direction of all the national energies toward a victorious conclusion. This includes the supreme strategic problem of controlling the army and the navy and regulating their joint action. It also includes the leadership of the people from whom the energies essential to the conduct of war are drawn with many complex subsidiary problems such as war finance and foreign relations. In this connection, General Ballard says:

> "The interesting light that is thrown backward by the Great War shows that Lincoln had a fine conception of the duties of the Higher Command.
>
> 1. From the first moment he realized the value of superior naval power and made the most of it. [Here General Ballard refers to the decisive influence of the navy in effecting the blockade and in controlling the Mississippi and its tributaries.]
>
> 2. The strategic deployment fitted in with political considerations and at the same time was suited to the conditions of a raw army. [Here General Ballard refers to the measures through which the Border States were saved

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"LINCOLN IN THE YEAR 1859"

A few days ago the latest publication of the Association, "Lincoln in the Year 1859," was mailed to its membership. This is the second daily record of Lincoln's activities to make its appearance. The first, "Lincoln in the Year 1858," was published in October of last year. The third, covering Lincoln during 1860, will be issued before the end of the current year.

The preface to the book just published contains a paragraph setting forth what the Association conceives to be the importance of this series of publications. That statement has aroused enough interest to justify a more extended discussion.

A daily record of Lincoln's activities furnishes much more information than the mere recital of where he was and what he was doing on successive days. In 1858, for example, the record of his speeches reveals clearly the political strategy of his senatorial campaign. With but occasional exceptions, those speeches were made in the central tiers of Illinois counties—the "Old Line Whig" territory. Lincoln knew that northern Illinois was his—there was no need for effort there; southern Illinois would go for Douglas—nothing he could do would change that; but central Illinois—the man who won that would be senator. We who know the result can easily see this. The important thing is to determine whether Lincoln, before the event, foresaw this and planned accordingly. The record of his speeches and a map of Illinois are proof positive that he did.

"Lincoln in the Year 1859" makes a different contribution. That year has generally been considered a period of quiescence in Lincoln's career. Yet, when studied intensively, it shows that Lincoln was active during this year, and that his reputation was steadily increasing. In 1858 he was out of the state but once, when he spoke at Burlington, Iowa. That visit was the result of an

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LUXURIES OF LINCOLNIANA

Beautifully printed, expensive limited editions of Lincoln studies evidently are profitable publishing ventures, for they continue to make their appearance. Usually the works issued in this form deal with restricted subjects, which, while of considerable interest to a few, would not have a wide enough appeal to justify a regular trade edition.

Three recent books of this class are William E. Barton's "A Beautiful Blunder," Robert W. McBride's "Personal Recollections of Abraham Lincoln" and Charles Moore's "Lincoln's Gettysburg Address and Second Inaugural." The first two are published by Bobbs-Merrill; the third by Houghton Mifflin.

Dr. Barton excels in the definitive treatment of specific subjects, as his long series of monographs and pamphlets adequately demonstrates. "A Beautiful Blunder" takes its place at the head of this group of minor studies. The book is an amplification of that part of the author's Life of Lincoln which dealt with the Bixby letter. Here, in one hundred and thirty-five pages, he goes into every nook and corner of this fascinating subject—how Lincoln learned of Mrs. Bixby's bereavement, how his letter was made public, the present whereabouts of the letter—no, it has *not* been found!—facsimiles and their makers, the later life of Mrs. Bixby and the three sons who were not killed but died years afterward. The book is excellent throughout.

In his "Personal Recollections" Mr. McBride sets down the memories of sixteen months' service in a cavalry company detailed as the President's personal bodyguard. The author frequently came in contact with Lincoln. He saw him walk at mid-night between the White House and the War Department; he watched him visit the wounded at the Soldiers' Home; he was present at the first meeting with Grant; and he

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EDITORIAL NOTES

A year or two ago the writer read an account of how, in one of the darkest moments of the Civil War, a visitor called on Presdent Lincoln and found him studying von Clausewitz, the German authority on military strategy. For the last six weeks he has been trying—unsuccessfully — to find that account again. He has looked through at least a thousand books, but the elusive Clausewitz remains as securely hidden as ever. Can anyone tell where the story of this incident may be found?

The Library of Congress is anxious to complete its file of Lincoln Centennial Association Bulletins. It lacks Number Five, and the Association has no extra copies. If any member has a copy of this number which he is willing to donate, it will immediately be forwarded to Washington in his name, if he will send it to this office.

One of the Record Books in the office of the Clerk of the Sangamon Circuit Court contains an order in the chancery case of Abraham Lincoln and Robert Irwin vs. Samuel Sidener. The suit was brought to foreclose a mortgage on some Springfield real estate, and the decree of foreclosure was granted November 21, 1854. At the Master's sale, held in February of the following year, Lincoln bid in the property for $628.54.

Thus one more is added to the number of Lincoln's personal law suits. Unfortunately, the papers in this case, as in most others with which Lincoln was connected, are missing. Until they are found the foregoing paragraph will contain the sum of our information. But most of these papers are preserved in private collections. Does anyone know the whereabouts of the bill of complaint in Lincoln and Irwin vs. Sidener?

LINCOLN AS A WAR EXECUTIVE

(Continued from page 2)

to the Union and foreign intervention avoided.]

3. The principle of maintaining pressure all along the line was constantly urged.

4. The chief objective, the main body of the enemy, was kept in view with a true sense of perspective.

5. There were no half measures. The questions of the Union and Emancipation were to be settled in such a way that they could never be reopened. This could only be done by destroying completely the military forces of the enemy.

These broad principles were faultless."

Lincoln's solution of this problem of the higher command was sound from the beginning. Success was delayed because until he could find a competent military commander, the Federal armies were incapable of "maintaining pressure all along the line." If Lincoln was compelled to descend from his proper sphere of "higher command" in order to control an important but subordinate element in the national team, it was not his fault. That he won the war in spite of this additional handicap is but a higher tribute to his genius.

The American reader will find some fault with General Ballard's discussion of the political situation preceding and surrounding the Civil War. Here the book is rather sketchy and inadequate. But the intelligent critic will bear in mind that this part of the book was written solely for the orientation of British readers who have little interest in the complexities of American politics.

Both books should be read by every intelligent American. They both awaken a new appreciation of the greatness of Abraham Lincoln. They both present a great, and still unsolved, problem in the organization of the modern democratic state.

INDIANA TO RE-CREATE LINCOLN HOME

The Indiana Lincoln Union, at its meeting in Indianapolis June 8, 1927, adopted tentative plans for the restoration of the old Lincoln home in southwestern Indiana, together with the backwoods surroundings in which it stood more than a hundred years ago.

Several projects in addition to the reconstruction of the Lincoln cabin are contemplated. The Union plans to remove the Southern railroad track from its present position between the homesite and the grave of Nancy Lincoln. It plans to purchase all the land originally in the Lincoln farm, and it is looking toward the erection of a memorial hall near the reconstructed cabin.

The cost of this work is estimated at $1,265,000, to be raised by popular subscription in a campaign scheduled to commence in the autumn of 1927.

At the present time the state of Indiana owns several acres surrounding the grave of Nancy Lincoln. This land has been made into an attractive and well tended state park. The site of the Lincoln cabin, perhaps a quarter of a mile from the park, is designated by a small granite marker.

LINCOLN IN THE U. S. COURT

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the seat of which was to continue at Springfield. Since Judge Drummond, who was assigned the northern district, was the senior judge, all records were transferred to Chicago, only to be destroyed in the great fire of 1871. Consequently there are in existence no records for the southern district earlier than 1855, and therefore we have documentary sources for Lincoln's U. S. Court work for a five year period only: 1855–1860.

For these years, however, the sources are prolific. The records show that Lincoln was of counsel in at least eighty-five of the thousand cases tried during these five years, and a careful search of the files has brought to light more than a hundred papers in his handwriting.

These papers show, for one thing, that no matter how truly the firm of Lincoln & Herndon may have been a "partnership" in other branches of the law, in the United States Court Lincoln did practically all the work. Most of the business was handled in the firm name. Occasionally Lincoln had a case alone, or in connection with attorneys other than Herndon, but in any event the papers are nearly always in his handwriting. The one exception is the precipe—the formal notice to the clerk to issue summons—but even here Herndon drew only about one in ten. Of course there is no means of knowing which member of the firm bore the brunt of oral argument, but it seems reasonable to assume that when the senior partner did even the least important paper work, he too handled the cases in court.

These legal papers puncture the notion that Lincoln was averse to office work—that his love of the law commenced and ended with his presence in the court room. Among a pile of legal papers drawn by contemporaries, a pleading in Lincoln's hand is instantly noticeable for its neatness and precision of form. Such papers, involving an enormous amount of labor, most of which could have been performed by clerks, were hardly drawn by a man whose heart was not in his work.—Indeed, it is hard to imagine just what were the duties of these numerous individuals who at one time or another studied in the Lincoln & Herndon office. The writer has seen hundreds of the papers of the firm. The great majority were drawn by Lincoln, while of the remainder only a few were not in Herndon's handwriting. And the clerks themselves testify that the office was never swept.

Collections constituted the bulk of Lincoln's business in the United States

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Court. He and Herndon handled these for numerous clients, but they did a particularly large amount of work for S. C. Davis & Co. of St. Louis. Over the five years Lincoln & Herndon brought nineteen suits for these clients, in all of which except two they obtained judgments. The causes for action other than assumpsit were mainly trespass and ejectment. There were a few chancery cases, mostly to foreclose mortgages.

Several individual cases have an interest. There is Bacon vs. The Ohio and Mississippi Railroad Company—the line that has since become the southern branch of the Baltimore and Ohio in Illinois. Among the papers in this suit there is a lengthy declaration setting forth the defendant's debt of $312,-133.35, and asking for this sum plus $1,000 damages. While signed "W. H. Herndon," the declaration, including the signature, is entirely in Lincoln's handwriting. The order of the court, also in Lincoln's handwriting, recites that "Abraham Lincoln, an attorney of this court," entered the appearance of the defendants and filed a power of attorney, "and thereupon confessed the indebtedness in the declaration mentioned, to the amount of three hundred and twelve thousand, one hundred and thirty-three dollars and thirty-five cents, and also costs of suit." Thus the matter was disposed of entirely within the firm of Lincoln and Herndon.

Then there is Ambos vs. Barrett, commenced in December, 1858, for the collection of an indebtedness of $15,000. Lincoln represented the plaintiff, really the Columbus Machine Manufacturing Company of Columbus, Ohio. On February 14, 1859, Lincoln collected $1,000 from Barrett and continued the case. But Lincoln's clients were impatient, and he was in no mood to put up with their importunities. "I would now very gladly surrender the charge of the case," he wrote a member of the firm, "to any one you would designate, without charging anything for the much trouble I have already had." At the July term the case was again continued, whereupon came another remonstrance from Lincoln's clients. Lincoln was disgusted. "My chief annoyance with the case now," he wrote the company's Columbus attorney, "is that the parties at Columbus seem to think it is by my neglect that they do not get their money." Lincoln thought that while the whole amount could not be got soon, it would all ultimately be paid, "and that it could be got faster by turning in every little parcel we can, than by trying to force it through by the law in a lump." Evidently his advice was followed, for the case was continued beyond his possible connection with it.

Sooner or later, in any discussion of Lincoln's legal work, comes the question of his ability. Some would have it that he was without a peer as a jury lawyer, others that his best work was done only when he had ample time for careful preparation. The writer hoped that these records would throw some light on this disputed question, but such a large proportion of Lincoln's cases were won by default, or settled by agreement, that the data derived from the remainder is too incomplete to furnish conclusive information. Nevertheless, it is offered for whatever it is worth.

During this five year period only seven cases in which Lincoln was counsel came to trial before a jury. Of that seven he won three and lost four. Fourteen were tried before the court without a jury. Of these, four were won and ten lost. Fifteen contested suits were dismissed by Lincoln and Herndon before they came to trial. On the other hand they won twenty-eight by default. The balance of cases with which Lincoln was connected were either dismissed by agreement, or tried after June, 1860, when his active legal work ended. In spite of this rather adverse showing, an indication of Lincoln's reputation as a lawyer is furnished by the fact that in most of cases continued after 1860 other counsel supplanted the firm of Lincoln and Herndon.

"LINCOLN IN THE YEAR 1859"

(Continued from page 3)

invitation extended only a few days in advance. But in 1859 Lincoln travels to Iowa—and speaks—and to Wisconsin, to Ohio and Indiana, and to Kansas, making at least eighteen speeches outside of Illinois. Besides, as he wrote a correspondent, he constantly received invitations he was compelled to decline.

These trips and speeches mean more than the mere spread of Lincoln's fame. When he spoke, new audiences heard him. Local newspapers carried his words to thousands who couldn't hear him. Other newspapers clipped accounts of his engagements. Thus was built up, during 1859, a sense of Lincoln's prominence which was soon to make him, if not the outstanding presidential candidate, at least an acceptable one.

The compilation of these daily records has resulted in the altogether unexpected discovery of important Lincoln material. Work on the 1858 booklet led to the office of the clerk of the U. S. Court in Springfield, where there were known to be two or three bonds for costs signed by Lincoln. With that lead, the files were searched carefully—and more than a hundred legal documents, all in Lincoln's handwriting, came to light. By court order these documents have been replaced by photostatic copies, and the originals put in safe keeping. Work on the 1859 book has resulted, among other finds, in the discovery of newspaper reports of several completely forgotten Lincoln speeches. Three of these are of more than casual importance. At Beloit, Janesville and Indianapolis Lincoln was already developing his Cooper Union doctrine. Instead of coming forth unheralded, the central ideas of that address had been mulled over and tested for nearly six months.

When complete, this series of records will furnish a valuable check for innumerable Lincoln stories and traditions, hitherto unsusceptible of proof or disproof without enormous labor. One such example was cited in the preface of the booklet just issued. That instance is of enough interest, however, to justify a somewhat fuller treatment.

On the authority of Horace White, who was with Lincoln during a large part of the campaign, it was stated in "Lincoln in the Year 1858" that on August 26 Lincoln was at Dixon, Illinois. Here a conference was held, and the questions Lincoln intended to put to Douglas on the next day discussed. That conference has become famous, for, when advised not to ask the question concerning the legal ability of a territory to exclude slavery, Lincoln is supposed to have replied, "I am after larger game; the battle of 1860 is worth a hundred of this." But Mr. George C. Dixon of Dixon, Illinois, doubted—and set to work. In a short time he had collected enough statements from persons present at the Freeport debate to prove without doubt that Lincoln came to Freeport on the morning of the 27th from a point *beyond* Dixon. Then another investigator, Mr. Jacob Thompson of Macomb, Illinois, resurrected the old Room Book of the Randolph Hotel in Macomb, and by that means proved conclusively that Lincoln was there at least part of the day on August 26. Mr. Dixon soon brought forth other statements to show that Lincoln arrived at Amboy on the afternoon of the 26th, spent the night there, and participated in no such conference as is generally described. As a result of the work of these men Lincoln's movements prior to the Freeport debate have been completely checked out, and the famous Dixon conference relegated from a history-making meeting to a very informal discussion hurriedly held on the train or in the hotel before the debate, if it took place at all.

But, without exception, all this has to do with Lincoln *away* from Springfield. Isn't that all there is of importance in these daily records? Why bother with a monotonous recital of his cases in court,

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his bank deposits, his petty political speeches, his attendance at concerts?

The method of biography is necessarily selective. The biographer surveys his subject's life, and, for primary emphasis, selects important or "significant" events. Even in that part of his work which has to do with the ordinary humdrum of his subject's daily life selection is necessary. Here, instead of the "significant," the author concentrates on the "typical." Because of spatial limitations, and tested principles of art—and what biographer does not attempt to make his book a work of art?—this is unavoidable. But very frequently the selective process results in distortion. Nine-tenths of a man's life is thrown into deep shadow because of what he did in the well-lighted one-tenth.

Such publications as these daily records show that for every day Lincoln spent in the public eye there were dozens in which he went about his court work, his letter writing and his social duties. Therefore they reveal not so much the figure readers of history have come to picture, as the man the neighbors and lawyers, merchants and politicians of Springfield actually knew. The record is monotonous? Most of life is monotonous.

Let it be remembered that what has here been written applies to the *plan* of this series of booklets rather than to the *execution,* as illustrated by "Lincoln in the Year 1858" and "Lincoln in the Year 1859." If perfectly done, we believe these publications would have the foregoing merits. They are not perfectly done, and it is only by wide-spread cooperative effort that perfection can be even approached.

LUXURIES OF LINCOLNIANA

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stood not twenty feet away when the Second Inaugural was delivered.

While of no great historical value, Mr. McBride's recollections are exceedingly interesting. In his pages one finds a gentle, lovable, very human figure—Abraham Lincoln. And one need only read to reach a conviction, not always derived from reminiscent literature, of the sincerity of the author and the general trustworthiness of what he writes—qualities attested to, from personal knowledge, by Albert J. Beveridge in his introduction.

That part of Mr. Moore's book which is devoted to the Gettysburg Address is the best thing yet written on the subject. His description of the dedication ceremonies and Lincoln's part in them is largely from contemporary sources, and would seem to be definitive. Lincoln's preliminary drafts of his address and the copies he made after its delivery are carefully discussed. The book contains facsimiles of all the drafts and copies in Lincoln's handwriting, as well as the three contemporary stenographic accounts.

Just why the Second Inaugural was included is a mystery, unless it was to provide reading matter to accompany the facsimile of the manuscript and corrected printer's proof. The text is commonplace and adds nothing to what is already known.

LINCOLN AND THE SUPREME COURT.

Lincoln was one of the Republicans who believed that the Dred Scott decision denying the right of congress to prohibit slavery in the territories was the product of a conspiracy engaging President Pierce, President Elect Buchanan, Senator Douglas of Illinois and Chief Justice Taney of the United States Supreme court. He was foremost in saying so, and no more serious charge was ever brought against that court. He was not the first but he was probably the most persuasive. He used his parable of the carpenters, Stephen, Franklin, Roger and James, who couldn't have produced a lot of framed timbers with the tenons and mortices exactly fitting, unless they had worked upon a common plan or draft.

It was, he said, a conspiracy to nationalize slavery, exposing not only the territories but the free states themselves to invasion. He said he refused to obey the decision as a political rule. It was not sacred. He would not resist it, but it had to be changed. If he were in congress he would vote to prohibit slavery in the territories in spite of it.

The days of Marshall had seen attacks on the Supreme court, and on the constitution as interpreted by it, but nothing in those days had the force and violence of the denunciation of Chief Justice Taney and the majority of the court. Northern conservatives even feared that the clergy would wind up a rebellion against the government, the constitution, and the court.

It had been the intent of the court merely to rule that Scott, when his master returned from Illinois and from Fort Snelling with him, had not carried back with him any freedom gained by residence on free soil. He was back under the laws of Missouri and was a slave. That was the decision of the State Supreme court in 1852, but had not been the decision of the trial court, which held Scott to be a freeman. The approach of the case to the United States Supreme court was devious and full of trickery. The court after hesitating decided to accept jurisdiction, to ignore the Missouri compromise and the basic question involved in it and to uphold the Missouri Supreme court decision. Justice Nelson of New York was assigned to write the opinion and that, if the program had been carried out, would have ended the matter. Abolitionists would have been angry, but the raging Kansas and Nebraska question would not have been made more explosive by the dictum that congress could not prohibit slavery.

What changed the entire complexion of the issue was the discovery that two justices, McLean and Curtis, intended to give dissenting opinions, going to the heart of the case and upholding the constitutionality of the Missouri compromise. Thereupon the majority judges decided that the issue had been forced, and that it would have to be met.

In the meantime the case had been delayed to avoid getting it into the election, a circumstance which would not have been so significant if the original plan of a simple opinion as to Dred Scott and nothing else had been followed. When it was enlarged to meet the situation created by the two dissenting judges, then the pattern of a conspiracy to safeguard slavery could be traced by the abolitionists, the free soil men, and by the Republicans.

Pierce had insisted that the compromise was void. Congress had repealed it. Douglas had worked out the substitute in the Kansas-Nebraska act permitting the people of the territories to decide the question themselves in their constitutions as they were admitted to the Union. Buchanan, about to be inaugurated, thought that if the inability of congress under the constitution to prohibit slavery in territories were recognized and determined there would be peace. He accepted the idea that he should say something about it in his inaugural address.

He did, saying that it should and would be speedily determined and that he in common with all good citizens would cheerfully submit to the decision whatever it might be. That later was seen as a trick. Chief Justice Taney wrote the opinion and after the inauguration it was given, holding that congress had no power to prevent the extension of slavery into the territories and opening the way, as Lincoln insisted, for an opinion that even a free state could not interfere with the property rights of a slave holder moving with his chattels.

Lincoln's carpenter parable found Pierce, Douglas, Buchanan, and Taney providing the pieces of timber with which this slavery house could be erected. Each piece fitted and each had been produced for its purpose. The conclusion was that it had been by conspiracy involving the Supreme court in turpitude, denying congress the authority to do what had been done when the Northwest Territory was organized with slavery forbidden.

Opposition to the court was widespread in the north. The northern clergy preached rebellion. Beecher misquoted Taney and had him say that the Negro had no rights a white man was bound to respect. Taney's words had been that at the time of the Declaration of Independence this had been the feeling. The Rev. George B. Sheever of New York said it was the "duty of every one to disobey." "Our submission is sin." The south exclaimed that sedition was prepared in the north to nullify the constitution and overthrow the Supreme court to gain its ends.

Time has softened the reproaches against the court. Taney's integrity is accepted by historians as unimpaired by this decision of his later years, but it was a political decision. To Lincoln it offended the constitution. It impaired the rights of man. It promoted injustice. It was a piece of the program by which tyranny in control of government was invading the rights of citizens in free states. It denied authority to congress which had been plainly provided.

Therefore it was not sacred. It could be changed. He refused to obey it as a political rule.

Chicago Daily Tribune
THE WORLD'S GREATEST NEWSPAPER

TUESDAY, FEBRUARY 12, 1929.

Lincoln Obeyed Adverse Decision Of Court-- Then Carried Amendment Battle To Victory

Great Emancipator Sprang Into National Fame on Constitutional Issue

At a time when the U. S. Constitution is being widely discussed and may even become a campaign issue, Lincoln's birthday comes with peculiar force. For Lincoln himself faced a constitutional problem not unlike those of today. What it was and how it was solved is told here by Charles A. Beard, dean of American historians and political scientists. He is the author of "The Rise of American Civilization," and "Economic Interpretation of the Constitution."

By CHARLES A. BEARD

As the fifth decade of the Nineteenth Century drew to a close, Abraham Lincoln sprang into fame on a Constitutional issue.

In 1856 the Republican Party launched a national campaign on the proposition that slavery should be prohibited by Congress in the territories of the United States. To this proposition Mr. Lincoln gave his approval.

But the very next year the Supreme Court of the United States, in the Dred Scott case, declared that Congress had no power to prohibit slavery in the territories. This was a staggering blow to the Republican Party.

By a single stroke the Court had blotted out the principal plank in its platform, had destroyed its chief reason for existence. The party was seeking to capture the Federal Government and proclaim freedom throughout the territories.

Change Impossible

The court had said in effect: Under the Constitution this action cannot be taken by Federal authorities.

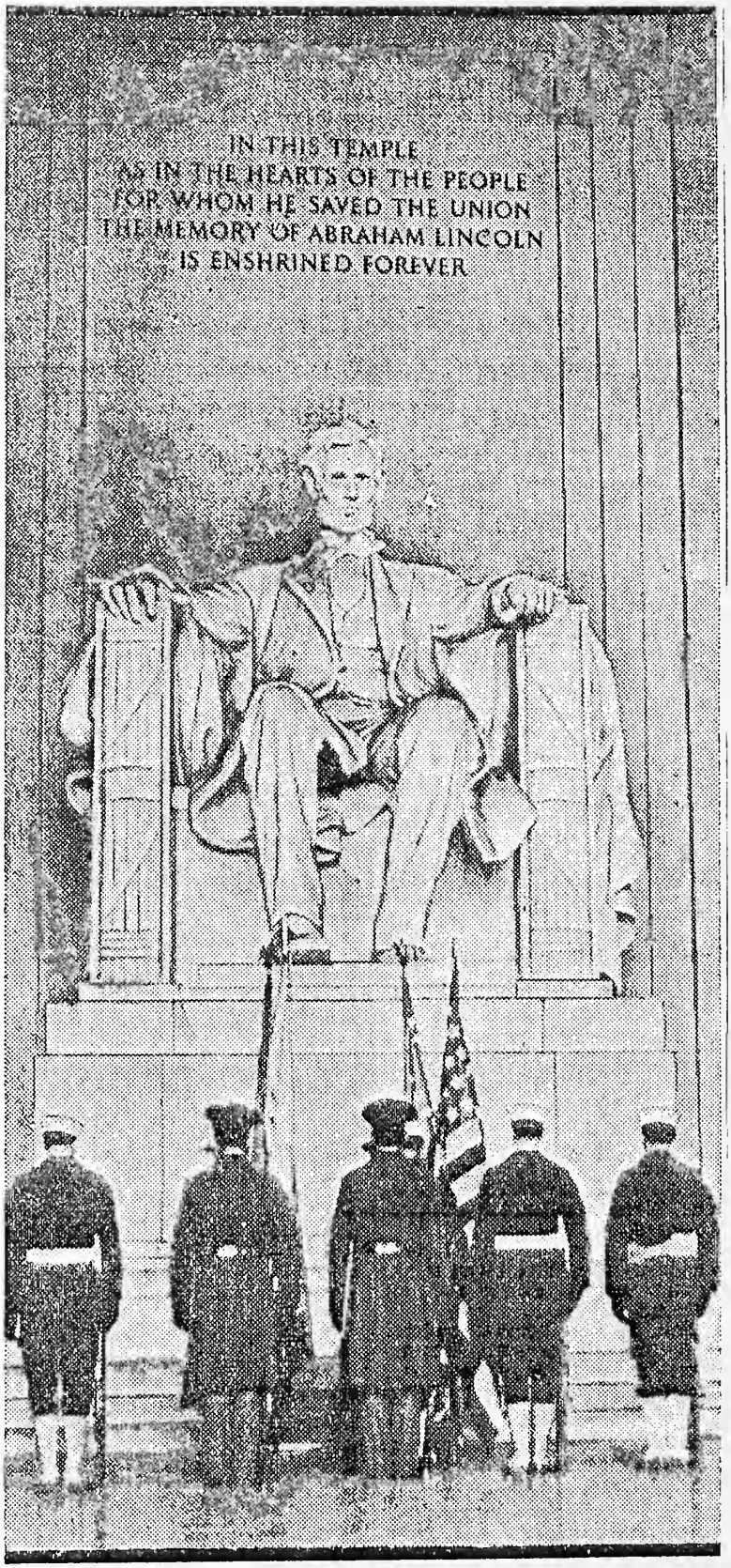
Why not amend the Constitution and give Congress the power which Republicans proposed to exercise? That sounded well in theory, but it was impossible in practice.

No amendment can be made without approval of three-fourths of the states. Given the number of slave states in 1857, an amendment against slavery in the territories was out of the question.

For Republicans who respected the Supreme Court and the Constitution that was a challenge. It was a "hot one."

Lincoln Meets Challenge

Araham Lincoln dared to pick it up and declare his principles and program. He said that he would obey the decision of the Supreme Court in the Dred Scott case. That was an obligation resting on every citizen.



Standing at attention before Daniel Chester French's mighty statue of Abraham Lincoln in Washington this detachment of sailors and marines typifies the veneration with which a nation thinks of Lincoln on the 127th anniversary of his birth. An average of 3000 Americans pass through this shrine daily, paying their tribute to

But he added that the Supreme Court had often reversed itself and that he and his supporters would seek to have it reverse the interpretation made in the Dred Scott case.

"Will he appeal to a mob?" cried Stephen A. Douglas.

To questions of this kind Mr. Lincoln replied simply, in substance: We think the Dred Scott decision wrong and we shall appeal to the people of the United States.

In time, new judges could be appointed by the President and the Senate, and a majority obtained for a different view of the Constitution. Since an amendment was not then possible, a change in the membership of the Court was the only way out for the Republicans.

"Tampering with the judiciary," screamed horrified Democrats, but Mr. Lincoln and the Republicans demanded another interpretation of the Constitution by a Supreme Court differently constituted.

On this point Mr. Lincoln was as firm as steel, and in strong words he appeared to the voters for support.

"Familiarize yourselves with the chains of bondage," he said, "and you prepare your limbs to wear them. Accustomed to trample on the rights of others, you have lost the genius of your own independence and become the fit subjects of the first cunning tyrant who rises among you.

"And let me tell you that all these things are prepared for you by the teachings of history, if the elections shall promise that the next Dred Scott decision and all future decisions will be quietly acquiesced in by the people."

Without condemning the Supreme Court decision expressly, the Republican platform of 1860 declared the doctrine laid down in the opinion to be contrary to the Constitution, "revolutionary in its tendency, and subversive of the peace and harmony of the country." On this platform, Abraham Lincoln was elected President of the United States.

In his first inaugural, President Lincoln paid his respects to the Supreme Court. Its rulings in particular cases were to be obeyed so far as those cases ran.

But he continued:

"If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

What President Lincoln and the Republican Party would have done about this Constitutional issue if war had not come, nobody knows or can ever know. What they did do amid the war is a matter of record.

In 1862 they pushed through Congress and enacted into a law a bill prohibiting slavery "in the present territories of the United States and in any that shall hereafter be acquired."

Law Is Overridden

The Constitution was unchanged. The Dred Scott decision stood. Chief Justice Taney still lived.

It was written in the law books that Congress had no power to prohibit slavery in the territories. Yet Congress and the President prohibited slavery in the territories.

Not content with this defiance of the past, Mr. Lincoln decided to strike a mortal blow to slavery in the states. Under the Constitution, only each state acting alone, "within its own sphere," could vote slavery up or down. Neither the President nor Congress, nor both combined, could touch "the peculiar institution" in any state.

But war creates "an emergency." President Lincoln was commander-in-chief of the armed forces of the Union. And under the sanction of war power, Mr. Lincoln, by mere proclamation, emancipated slaves in the states and districts then in arms against the authority of the United States.

For this fateful stroke of state there was no express warrant in the Constitution. Yet Mr. Lincoln made a broad interpretation to justify his action.

Amendment Is Ratified

At best this was a "war measure." Could the Proclamation of Emancipation be enforced on the return of peace? On this constitutional point there were grave doubts. Besides, slavery was still in effect in the states and districts not in arms against the Union.

To finish the work thus started, Mr. Lincoln took the first step. He sponsored and Congress passed an amendment to the Constitution abolishing slavery throughout the United States.

By skillful maneuvering, Mr. Lincoln and Republican managers were able to win the approval of three-fourths of the states. The amendment was ratified. The Constitution drawn by the Fathers was changed to meet the spirit and circumstances of the new time.

Thus a great public policy, both moral and economic in nature, was written down in the Constitution of the United States. The leader who had dared to take up that policy when it was "dangerous," who dramatized it, who gave his life for it, was lifted into immortality, for all ages, for all climes, for all humanity.

Those who imagine that the Constitution is a mere theme for hair-splitting by "great constitutional lawyers" may well ponder and remember the life and labor of Lincoln, the Emancipator.

Lincoln's View of the Supreme Court

2/12/36 N.Y. Herald Tribune

To the New York Herald Tribune:

There has been a recent tendency to compare the extraconstitutional measures resorted to during the present economic emergency with the attitude of Abraham Lincoln toward the Constitution and the Supreme Court in the military emergency of the Civil War.

The Emancipator's birthday is an appropriate occasion for examining the point. Lincoln has been charged with denouncing the United States Supreme Court after the Dred Scott decision, and with flouting the Constitution in his issuance of the Emancipation Proclamation and his military trials of civilians during the Rebellion. It is difficult to find merit in the accusation that he trampled the Constitution underfoot. The facts may be reviewed, however, without necessarily passing upon the justification for the present Administration's extra-constitutional program, or determining whether conditions of 1932 approximated in gravity those of 1861.

* * *

Lincoln was drawn into the public discussion of the Dred Scott decision by Stephen A. Douglas, who in an address in Springfield castigated every one who opposed the court's conclusions. Lincoln spoke in the Hall of Representatives in Springfield on June 30, 1857, and while not yet a candidate against Judge Douglas, took occasion to state that the Republicans believed quite as much as the Democrats that opinions of the Supreme Court should be respected:

> We think its decisions on constitutional questions, when fully settled, should control not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments to the Constitution. . . . More than this would be revolution. But we think the Dred Scott decision is erroneous. We know that the court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this. We offer no resistance to it.

Such is scarcely the language of one who would discard the Constitution or destroy the authority of the judiciary. After he had joined in the contest with Douglas, he spoke from the balcony of the old Tremont House in Chicago, July 10, 1858, and although warmed by the applause of the crowd, which bitterly resented the decision, he went no further than to again suggest a rehearing of the issue, but accepted the ruling as far as it concerned Dred Scott. He said:

> I do not resist it. All that I am doing is to refuse to obey it as a political rule. . . . We mean to reverse it and we mean to do it peaceably.

In all this Lincoln obviously was looking for a better case which would give the court opportunity to recast its opinion. Later in the campaign, at Quincy, on an engagement where he made his acquaintance with young Carl Schurz, he denied that he had ever said the case was concocted by "Democratic" owners of Dred Scott, and denounced as a "Douglas hireling" one who attributed the remark to him, but he did challenge the bona fide, genuine nature of the litigation. He did not defy the court, nor suggest other than orderly, constitutional methods in seeking a reversal.

* * *

Turning to the Civil War, it must be recalled that the Emancipation Proclamation liberated slaves only in the states whose citizens were in rebellion against the Federal government. Those states had voluntarily surrendered any rights under the Constitution. Even if we concede that the Constitution sanctioned the indeterminate continuation of slavery, although the framers hoped to eliminate it by prohibiting importations of slaves after 1808, the seceding states surely had no recourse to constitutional protection. The question was ably analyzed by Edward Everett, who concluded:

> It is very doubtful whether any act of the government of the United States was necessary to liberate the slaves in a state which was in rebellion. There is much reason for the opinion that, by the simple act of levying war against the United States, the relation of slavery was terminated; certainly, so far as concerns the duty of the United States to recognize it, or to refrain from interfering with it.

To recognize the right of slavery under the conditions of rebellion, he emphasized, would be to acknowledge the right of a rebel master to employ his slave in acts of rebellion and treason, and the duty of the slave to abet his master in such rebellion and treason. Certainly, the Constitution did not command the preservation in a period of rebellion of an institution which would defeat the Constitution's own ends of solidarity and union.

The charge against Lincoln, however, is usually built on his suspension of the writ of habeas corpus. The cases were numerous, but the most noteworthy instance was when General Burnside hauled C. L. Vallandigham before a military court. Vallandigham had just been defeated for re-election to Congress and was stumping Ohio on an anti-war ticket, making speeches Burnside considered seditious. The military court sentenced him to prison, but Lincoln had him passed out of the Union into the Confederate lines. The action caused great excitement and Lincoln was swamped with protests, the most formidable coming from a large Democratic gathering held in Albany, which denounced the assumption of power by a military tribunal as abrogating the right of the people to assemble and discuss affairs of government, of liberty, of speech and the press, of the right of trial by jury, the law of evidence and the right of habeas corpus.

* * *

The resolutions added that "it strikes a fatal blow at the supremacy of law and the authority of the state and Federal constitutions." Lincoln studied these resolutions and determined to give a candid answer, in which he pointed out that the insurgents had been preparing their revolt for thirty years, and added:

> It undoubtedly was a well pondered reliance with them that in their own unrestricted efforts to destroy Union, Constitution and law all together the government would in great degree be restrained by the same Constitution and law from arresting their progress. . . . Under cover of "liberty of speech," "liberty of the press" and "habeas corpus" they hoped to keep on foot amongst us a most efficient corps of spies, informers, suppliers and aiders and abettors of their cause in a thousand ways. . . .
>
> Ours is a case of rebellion—so called by the resolutions before me—in fact, a clear, flagrant and gigantic case of rebellion; and the provision of the Constitution that "the privilege of the writ of habeas corpus shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it" is the provision which specially applies to our present case. This provision plainly attests the understanding of those who made the Constitution that ordinary courts of justice are inadequate to "cases of rebellion"—attests their purpose that in such cases men may be held in custody whom the courts, acting on ordinary rules, would discharge. Habeas corpus does not discharge men who are proved to be guilty of defined crime, and its suspension is allowed by the Constitution on purpose that men may be arrested and held who cannot be proved to be guilty of defined crime "when in cases of rebellion or invasion the public safety may require it."

Lincoln's real attitude on the Constitution may be seen from his first statement in answer to the Albany resolutions. "The resolutions promise to support me," he said, "in every constitutional and lawful measure to suppress the rebellion; and I have not knowingly employed, nor shall knowingly employ, any other."

* * *

President Lincoln undertook the war to save the constitutional Union. He could not very well begin that work by throwing the Constitution out the window. "The war will be prosecuted," he said, "for the object of practically restoring the constitutional relation between the United States and each of the states." There is nothing to indicate, subsequent decisions of the court notwithstanding, that Lincoln ever deliberately put the Constitution on the shelf. With hostile armies knocking at the gates of Washington, he used every emergency power at his disposal, but still conducted a government of law. His own explanation of his attitude seems the best:

> It was in the oath I took that I would to the best of my ability preserve, protect and defend the Constitution of the United States. I could not take the office without taking the oath. Nor was it my view that I might take an oath to get power, and break the oath in using the power. . . . I did understand, however, that my oath to preserve the Constitution to the best of my ability imposed upon me the duty of preserving by every indispensable means that government—that nation of which that Constitution was the organic law. Was it possible to lose the nation and yet preserve the Constitution? By general law life and limb must be protected, yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation. Right or wrong, I assumed this ground, and now avow it.

Under the circumstances of acute national stress and of rebellion and invasion, Lincoln's policy appears to be not only constitutional but what the Constitution imperatively required from the Commander in Chief of the Army in warfare.

GLENN I. TUCKER.

Scarsdale, N. Y., Feb. 11, 1936.

THE SUPREME COURT

Address

by

Hon. William E. Borah

of Idaho

On February 1, 1937

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ADDRESS

BY

HON. WILLIAM E. BORAH

Mr. CONNALLY. Mr. President, Monday night the senior Senator from Idaho [Mr. BORAH] delivered a notable address entitled "The Supreme Court." I ask unanimous consent that it may be printed in the RECORD.

The PRESIDENT pro tempore. Without objection, it is so ordered.

The address referred to is as follows:

Ladies and gentlemen, in a free government, no public official, the records and policies of no public institution, should be regarded as exempt from searching consideration, or criticism, at the hands of the people. Neither can infallibility be expected of any man, or set of men.

In considering the history, decisions, and opinions of the Supreme Court of the United States, and in seeking to estimate its worth in the machinery and strength of our Government, it would be unreasonable, if not absurd, to proceed upon any different theory. That the Supreme Court in its long history has erred, I would be the last to deny; that it will err in the future, I entertain no doubt; that it has on some occasions felt the effect of mad party passions raging about it is probably true. But after all this is admitted, when its worth is measured by the service it has rendered to the cause of human liberty, to the advancement of human happiness, and to the maintenance of a government of law rather than a government of men, that it stands among the foremost institutions of the world seems true beyond peradventure of a doubt.

The effort to establish and maintain an independent and uncontrolled judiciary long antedated the adoption of our Federal Constitution. The great desire to have a place in government where the humblest citizen might seek justice with no fear that his cause would suffer from the influence of political power was interwoven with the long struggle for Anglo-Saxon liberty.

Far back in English history, still read with unfailing enthusiasm, Sir Edward Coke, Chief Justice of the King's Bench, flung the laurels of a lifetime in the face of his King when the first Stuart bade the chief justice postpone consideration of a matter pending until His Majesty could make known to him the wishes of the Crown. Since then volumes have been spoken and written on this subject, and the victorious progress of the English-speaking world owes much to the success of this vital principle in free government.

But the action of Sir Edward Coke was as exceptional as it was courageous. There was yet a long contest ahead before the example he set could be brought to acceptance by those in power. One of the main questions settled by the English revolution of 1688 was that the people should have the right to appeal for protection to an independent tribunal of justice. Prior to that time the judges were subject to removal by the King. Under this power he took some of the keenest intellects and brightest minds

of the English bar and made of them the corrupt and willing instruments of oppression and injustice. Rather than to go before such a tribunal Essex took his own life in the tower. Under this system Pemberton was appointed, that he might preside at the trial of Russel, and was then recalled because his instructions, though strikingly unfair and partial were not sufficiently brutal to satisfy his ruthless master who had given him for a time his polluted ermine. Under such a system one of England's liberal statesmen, Sydney, was beheaded, freedom of speech destroyed, habaes corpus denied, and individual rights trampled underfoot. So when the English yoemanry, the common people, drove their monarch from the throne they wrote into the terms of the "act of settlement" that "judges' commissions be made during good behavior and their salary ascertained and established." This took it out of the power of the King to remove the judges and out of his power to impoverish them by withholding their salary. This was the first decided step toward an independent judiciary, and it was not long until the great English orator could truly say: "Though it was but a cottage with a thatched roof which the four winds could enter, the King could not."

Thereafter, instead of Jeffreys denouncing and cursing from the bench the aged Baxter, instead of Dudley taunting and tormenting the New England colonists, instead of Scroggs and Saunders, subtle and dextrous instruments of tyranny, we have Somers and Holt and York and Hardwick and Eldon and Mansfield laying deep and firm the great principles of English law and English justice—principles which still guard the personal rights of men and women and in lands far removed from the place of origin.

Someone has said that everything good in the Federal Constitution is a thousand years old. One would not like to accept that statement in full. But many of the good and wise things in the Constitution are a thousand years old. Much that may be found in the Constitution with reference to the courts and the liberty, the rights, guaranties, and privileges of the citizen, are a thousand years old. A thousand years before we set about our task of writing a charter of government those without influence or political power well understood the worth, and often prayed and sometimes fought, for a high-minded, humane, independent, and just judge, whom neither fear, favor, nor affection nor the hope of reward could bend from his course, as their only refuge against arbitrary power from the political side of the Government. The huge volume of English history in which was to be found the long struggle for personal liberty and unbought and unpurchasable judges lay open before the framers, and from it they copied with copious hands. The urge of originality was not so strong with them as their desire for truth. The sacrifices and suffering there recorded they were determined should not be recorded again in our country by the American people.

They therefore copied into our charter these rights, bought from long years of experience, and set up courts which they hoped, as Madison declared, "would consider themselves in a peculiar manner the guardians of those rights * * * that they will be naturally led to resist every encroachment upon rights stipulated for in the Constitution." In the brief time at my disposal I want to recall a few facts indicating how well the Court has performed the part assigned to it by Madison.

When Madison, perhaps the most accurately comprehensive and dispassionate mind of his day, declared that the court would "be an impenetrable bulwark against every assumption of power in the legislative or executive" he was not reflecting upon the integrity or purpose or the patriotism of men who would occupy the Executive chair or the want of ability or loyalty to American institutions of those who would make our laws. He was announcing a truth clear to him and as old as government and almost as unchanging and unchangeable as the ordinances of fate, that the political side

of governments does not, and in the nature of things cannot, guard the personal liberty and individual rights of citizens with that degree of vigilance which free citizens are entitled to enjoy and without which free government cannot exist. Faction and party zeal, debate, and political ambitions cannot hold the scales of justice in impartial hands or weigh either the charges or the evidence with unresentful judgment. The most enlightened political leaders and the most advanced of governments have utterly failed to wisely administer justice without the aid of independent and incorruptible courts. That has been true from Pericles to Washington and from Washington to Roosevelt.

We need not travel outside our own history or seek examples outside our own country. From time to time the executive and legislative, or, in other words, the political side of the Government, have disregarded or trampled under foot practically every guaranty found in the Bill of Rights. Under the Federalists' regime free speech, free press, and free assembly, under laws enacted and passed by the Congress and signed by the President, were denied to the citizen. Men were charged with crime and thrown into prison for criticisms of public officials or the acts of government, and in language which the House of Stuart or the Bourbon kings would have scarcely regarded as offensive.

Under the Democratic administration which followed men were arrested without warrant, thrown into prison, denied counsel, in violation of the plain provisions of the Constitution. Under the Republican administration which followed men were denied the right of trial by jury, and the right of free speech and free press were utterly ignored. In such instances the Supreme Court of the United States has, in the language of Madison, proved in every instance "in a peculiar manner the guardians of those rights."

But I claim for these facts nothing more than proof that in every free government courts removed from the turmoil and bitterness of politics are indispensable to the rights and liberty of the citizen, particularly the citizen who is without political influence or power. The experience of all history demonstrates this and common sense supports it. To reject or even essentially modify this great truth would present the most frightful and, at the same time, pathetic spectacle which the convulsions or decadence of nations affords—democracy on the back track.

It would be a serious error, if not a fatal mistake, to regard these questions touching the integrity of the Constitution and the independence of the Courts as party questions or to seek to treat them as such. If these are not governmental questions of concern to all people regardless of party, then there are no such questions. There are always those whose minds rise no higher than the level of party advantage, who may contend these matters may be made party questions. But I believe them to be small in number and far more diminutive in influence. To assume or to undertake to make it appear, especially in the light of American history, that any political party is the keeper of these heirlooms of democracy is too egregious for even the credulity of a political campaign.

Both the old parties have their records on this question, and they are not records that one would wish to recall except to avoid insofar as we can mistakes in the future. Neither of the old parties has hesitated at different times to disregard the guaranties of the Constitution or to denounce and assail the Court when its decisions failed to sustain their course. While the Court, under the leadership of Marshall, was delivering opinions which laid the foundation for national power and which were afterward proudly accepted by an entire people, the Court was being assailed and threatened with impeachment by the Democratic Party then in power. Bills were introduced designed to withdraw the jurisdiction of the Court. At this time the Court was criticized for ignoring State rights. In these days it is criticized because it does not wipe out State rights.

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When the Supreme Court held that a citizen in private life could not be tried by a court martial and that every citizen accused of crime was entitled to his day in court, a perfect storm broke upon the Court from Republican leaders. The Republican leader of Congress declared: "Whenever the decision of the Supreme Court, in the judgment of Congress, is subversive to the rights and liberty of the people * * * it is the solemn duty of Congress to disregard it." The leading Republican paper declared: "It is this view of the decision ignoring the vital interests of the Government * * * that a reconstruction of the Court looms up into bold relief." What had the Court decided? Nothing more than that the plain provisions of the Constitution were binding upon the Congress, upon the Executive, and upon the courts. These were the grounds upon which party leaders thought proper to advise disregard of the Constitution and defiance of the Court.

Experience teaches that it is difficult to set constitutional bounds to the action of a political party enjoying great political power or to a political party not enjoying power and striving in desperation to secure it.

It seems unnecessary to recall more of these historic incidents relating to attacks upon the Court because of decisions which afterward come to be looked upon and regarded as sound in principle and some of them as bulwarks of human liberty. There are other and numerous instances of this nature which I doubt not will come readily to the minds of my audience.

I make this comment, however, that it is a demonstrable truth, supported by a wealth of facts, that the Supreme Court, in instances too numerous to be recorded tonight, has thrown the shield of the Constitution about the rights of the citizen when all other appeals for relief have failed him. When war, passion, or mob passion, or political zeal, or selfish schemes have carried men beyond reason or justice, the Court, when called upon, has interposed to avert great wrongs. This is well illustrated by two recent cases: One where three ignorant, illiterate, impecunious Negroes, victims of mob passion and official cowardice, at last found safety and life in the order of the Supreme Court. The other, where a babbling fool, preaching destruction of the Constitution and the Court as the tools of capitalism, found liberty under the terms and by authority of the very things he would destroy.

By reason of certain decisions the Supreme Court is again under severe criticism. Again the political side of the Government feels that the Court is in great error. A study of the decisions to which opposition has been raised will disclose that, while a number of important matters have been passed upon, the dominant, overshadowing constitutional question, one which will return again and again, involves the distribution of power between the States and the Federal Government. It was this question, as you know, which came near dissolving in failure the convention which framed the Constitution. It was this question which, in the early part of our history, divided our people in a long and bitter controversy. And it was this question which entered so largely into that controversy which finally drenched the Nation in fraternal blood.

It is back with us again, augmented and complicated by reason of the problems growing out of our social and industrial development during the last 50 years. To use a somewhat worn and too familiar sentence, we are again at the crossroads as to this problem which, conjure it as we will, like Banquo's ghost, returns again and again to its place at the feast.

The great problem now is: Do modern conditions make it imperative that the Federal Government have greater, if not complete, control over most of the internal affairs of the States? That we have, in our legislation, not only since this depression but for

the last 40 years, been crowding more and more upon the undoubted internal affairs of the State can hardly be doubted. And it has seemed that the Court has gone to the utmost limit in sustaining some of these measures. That it has felt, however, compelled to hold that Congress has at times transgressed the plain terms of the Constitution has been no surprise to those who still believe in our dual system of government.

In the case involving the validity of the National Recovery Act this question was one of the determining factors. The Court was unanimous—conservatives and liberals, Republicans and Democrats—in holding that Congress had gone an arrow's flight beyond the terms of the Constitution. This unanimous opinion is difficult to explain away. He would be a bold liberal who would declare that Justice Brandeis is not a liberal, a humanitarian, and profoundly learned in constitutional law. He has said on one occasion: "All rights are derived from the purposes of the societies in which they exist, above all rights rises duty to the community." Justice Cardozo, whose liberal views and monumental knowledge of law would hardly justify his being placed among those who are not abreast of the times, indicated in his concurring opinion that the act under consideration was something in the nature of a legal riot. I take the liberty of mentioning these Justices personally because of the general charge that the Court, while honest and capable, is suffering from a case of arrested development and plagued with the views of ancient days.

But is this not a wholly different matter than the failure of the Court to do its duty? Have we not in good conscience arrived at the hour when we should consult a higher authority than courts or Congress or Executives—the people, the final authority upon this question of the distribution of power? It seems to me that a question has arisen which only the people have the authority or the right to settle. Should there be a redistribution of power between the State and the Federal Government? A question of this nature under present conditions cannot be put at rest by decisions from time to time upon particular statutes—it is more than a matter of judicial construction. It is not for us to urge, or connive, at the courts, through strained and doubtful construction, filching from the people power which the people have not granted.

If the people desire that the Federal Government shall have control over their local affairs, it is for the people to say so. If the people desire to leave to Congress the unlimited discretion as to the things for which it shall appropriate money and the things it shall do with the money, it is for the taxpayers to say so. The Court has no right to speak for them. What question is of greater concern to the people or comes more into their daily lives than the question of how much of local self-government it is safe and wise to surrender? How much greater authority shall there be for establishing bureaucratic control over everything that touches our daily living? Those who feel the Federal Government should be given full control over our local affairs have open before them a tribunal from which there is no appeal, and, under our system, a tribunal with exclusive jurisdiction.

In a few days we will pause in our deliberations in the Senate long enough to read Washington's Farewell Address, an address as fresh and up to date in many respects as if it had been written yesterday. His views will always be relevant so long as democracy is relevant. I quote: "If, in the opinion of the people, the distribution, or modification, of the constitutional power be in any particular wrong, let it be corrected by an amendment in the way the Constitution designates; but let there be no change by usurpation", either by Congress or the Executive or the courts, or by all of them combined.

In conclusion, many proposals are being made relative to our supreme judicial tribunal—all the way from designating the

number of judges required to declare an act of Congress unconstitutional to that of withdrawing from the court jurisdiction entirely. I presume some, or all, of these proposals will come along for discussion and consideration, and there is no reason why they should not. In my opinion, there is every reason why they should. By all means let the subject in all its ramifications and implications be discussed in the Congress and before the people. That is the way, and the only proper way, for democracy to settle its problems, and when our legislative body shall have adjusted the Court problem to the satisfaction of all, they may then rest from their labors. Besides, there is nothing more surely needed in this country, in my opinion, than a universal constitutional baptism. If our institutions are not fitted to serve the tranquillity and welfare of our people under present conditions, we surely should know it. And I know of no way to arrive at the truth of these things so well and so effectively as general, thorough debate. But any plan which undertakes to accomplish any redistribution of power between the State and the National Government without the full authority of the people, should be regarded as a mistake, a mistake that there is no reason for making. That is peculiarly the people's problem. And, under every rule or principle known to democracy, they, and they alone, should settle it. This purloining of constitutional power from the State by the Federal Government, beginning far back in the past, has passed beyond all reason, and before the final pillage takes place those who are most deeply concerned should be heard.

"The present day", Metternich was wont to say, "has no value for me except as the eve of tomorrow; it is with tomorrow that my spirit wrestles." Disregard of today can have no place in the affairs of a democracy. We must meet each day's demands, and omission to do so is at our peril. But disregard of tomorrow is scarcely less dangerous. To establish the precedent of making vital changes in our national charter without the authority of the people expressed in the manner pointed out by the Constitution may seem expedient for today but it may torment us on many a tomorrow. We may not always have in power those who use the powers of government in the interest of the people. It has been stated by high authority that the Federal Government now has the power and the governmental machinery which, in the hands of those with evil purpose, could destroy the rights of the people. Who knows when they will arrive?

It has been corectly said that the laws which the Assembly of France passed in the name of humanity and freedom Napoleon III used to put the members of the assembly in jail. The power which the German people gladly gave to Bruning in a good cause his successor made use of to rob them of the last vestige of self-government and of every semblance of liberty.

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MEMBER OF THE ASSOCIATED PRESS

LINCOLN AND THE BIG COURT

We are under a Constitution, but the Constitution is what the judges say it is.—*Charles Evans Hughes, now Chief Justice, United States Supreme Court.*

Today is Lincoln's Birthday, and all the papers will be sounding off editorially about Lincoln.

Most of the papers are shocked and horrified over President Roosevelt's proposal to reform the federal courts, beginning with the Supreme Court and working down. So you will find these papers' editorialists finding that if Lincoln were alive today he would be shocked and horrified, too. It's an old failing of human nature to be able to discover that some dead hero would have backed you up in any argument you make.

Abraham Lincoln

The fact is that Lincoln was elected President largely because he deplored and orated against one Supreme Court decision. And the fact further is that Lincoln while President was in continual conflict with the Supreme Court, headed at that time by Chief Justice Roger B. Taney.

Indeed, it seems to be a qualification for greatness as a President that the man in the White House shall be at odds with the Supreme Court. The two greatest Democratic Presidents before Roosevelt fought the Supreme Court, these Presidents being Jefferson and Jackson. And the three greatest Republican Presidents—Lincoln, Grant (greater as a General than as President) and Theodore Roosevelt—likewise battled with the Supreme Court in their time.

* * *

Dred Scott

The Supreme Court decision that elected Lincoln President, in addition to precipitating the Civil War, was the Dred Scott decision, handed down in 1857. By this decision, Chief Justice Taney in effect validated slavery all over the country. Taney did it by tearing up the Compromises of 1820 and 1850 and holding that a slaveowner could take a slave into any free State or Territory and keep him there as a slave—that freedom in the new home's laws didn't extend to the person of the slave brought there.

* * *

Taney—Traitor Or Dotard—?

Not so well known are the goings-on of Chief Justice Taney after the Civil War broke out.

Taney was a Southerner, appointed to the Supreme Court by Andrew Jackson in 1836. He was 84 when the war began. So it is a fair question whether he was a traitor to the United States or merely a dotard. If he had all his faculties and some of his reasoning power, Taney was a traitor.

Southerners like Robert E. Lee and Stonewall Jackson cannot be called traitors. When the United States was split in twain, these men resigned their Army commissions or wound up their affairs in the North and joined the Southern cause. We think we'd be much worse off today if their cause had won; but they acted from the highest and most honorable motives.

Taney was different. Sympathizing with slavery and the South, he held onto his Chief Justiceship, drew his pay from the United States Treasury, and as a traitor used the authority of his office in efforts to make Lincoln lose the war and to disrupt the Union.

Lincoln had to suspend the writ of habeas corpus, to keep lawyers from getting captured Southern spies or soldiers out of jail. Taney ruled this suspension unconstitutional. Lincoln had his Attorney General say it was constitutional, and ignored Taney.

In 1862, Taney planned to hold unconstitutional the Northern blockade of Confederate ports. This would have given the South an excellent chance to win the war. Lincoln got wind of Taney's intention to uncork the Confederate ports, and "packed" the Supreme Court by filling three vacancies with men he knew to be friendly to his Administration. Taney was beaten by the narrow 5-4 squeak with which we are nowadays so well acquainted.

His prestige gone, Taney kept on trying to embarrass Lincoln. He wrote opinions declaring unconstitutional the Lincoln greenbacks which largely financed the war, and the Conscription Act which for all its flaws did bring in men to fight the war. Taney never found occasion to file these opinions, but his determination to defeat the Union while drawing the Union's paychecks never faltered. He would have lost the Civil War for the Government that employed him if he could.

* * *

Yet we'll be told in many an editorial column this morning that Lincoln always worked along amicably with the Supreme Court, and would have battled with tongue and pen against any attempts to clip the Court's claws.

ABRAHAM LINCOLN ON THE SUPREME COURT

(Reprinted from The POST of February 12, 1936)

In his first inaugural, March 4, 1861—

> **. . . the candid citizen must confess that, if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.**

In his attack at Edwardsville, Ill., on the Supreme Court's decision in the Dred Scott case, September 13, 1858—

> **What constitutes the bulwark of our own liberty and independence? . . . Our reliance is in the love of liberty which God has planted in us. Our defense is in the spirit which prized liberty as the heritage of all men, in all lands everywhere. Destroy this spirit and you have planted the seeds of despotism at your own doors. Familiarize yourselves with the chains of bondage and you prepare your own limbs to wear them. . . . And let me tell you, that all these things are prepared for you by the teachings of history, if the elections shall promise that the next Dred Scott decision and all future decisions will be quietly acquiesced in by the people.**

Stephen A. Douglas was, of course, a Democrat. Lincoln therefore cited both Jefferson and Jackson against Douglas during the Lincoln-Douglas debates. At Springfield, Ill., July 17, 1858—

> **I think that, in respect for judicial authority, my humble history would not suffer in comparison with that of Judge Douglas. He would have the citizen conform his vote to that (the Dred Scott) decision; the member of Congress, his; the President, his use of the veto power. He would make it a rule of political action for the people and all the departments of the Government. I would not . . . "to consider the judges as the ultimate arbiters of all constitutional questions" (Jefferson commented in a letter in 1820)—"a very dangerous doctrine indeed, and one which places us under the despotism of an oligarchy." . . . Thus we see the power claimed for the Supreme Court by Judge Douglas, Mr. Jefferson holds, would reduce us to the despotism of an oligarchy. . . .**
>
> **Let us go a little further. You remember we once had a national bank. Some one owed the bank a debt; he was sued and sought to avoid payment, on the ground that the bank was unconstitutional. This case went to the Supreme Court, and therein it was decided that the bank was constitutional. The whole Democratic Party revolted against that decision. General Jackson himself asserted that he, as President, would not be bound (by it) . . . the Democrats have contended for that declaration, in the very teeth of the Supreme Court, for more than a quarter of a century. In fact, they have reduced the decision to an absolute nullity.**

In his great address at Cooper Union here on February 27, 1860, Abraham Lincoln referred to the Supreme Court as "presumptuous" and "impudently absurd" in its reading of the Constitution in the Dred Scott case.

And on another occasion he said of the same decision:

> **The Supreme Court has got the doctrine of popular sovereignty down as thin as homeopathic soup that was made by boiling the shadow of a pigeon that had starved to death.**

The Evening Bulletin
2/12/37

GOVERNOR EARLE SPEAKS AT LINCOLN'S TOMB

Springfield, Ill., Feb. 12—(AP Wirephoto)—From left: Governor Henry Horner, of Illinois; Mrs. George H. Earle, Governor Earle, and David Lawrence, Pennsylvania Democratic chairman, as they attended ceremonies commemorating the 128th anniversary of Lincoln's birth. Governor Earle said that Lincoln, if alive, would seek reorganization of the Supreme Court just as President Roosevelt has done.

Gov. Earle Quotes Lincoln Addresses to Show Need of Changes in Supreme Court

"If Lincoln were president today, how would he view the supreme court?"

Governor George H. Earle of Pennsylvania, guest speaker at the annual Mid-Day Luncheon club observance of President Lincoln's birthday, held Thursday night at the Springfield high school auditorium, asked this question, then quoted Lincoln's own words, questioning the right of the supreme court to be the final judges of constitutional questions.

"You are hearing the cry go up from some quarters from the very people who give lip service to the sacred memory of Abraham Lincoln, that the supreme court can do no wrong," he said.

"What Lincoln had to say here in Springfield July 7, 1858, might interest them.

"He warned his fellow citizens that to accept supinely the power claimed for the supreme court would—and I quote—'reduce us to the despotism of an obligarchy.'"

Governor Earle, who with Rev. Merton S. Rice, pastor of the Metropolitan Methodist Episcopal church, Detroit, Mich., were the chief speakers of the evening, was introduced by Governor Horner.

Gov. Horner Speaks Briefly

Governor Horner prefaced his introduction with a few brief remarks about Abraham Lincoln in whose memory the program was held.

"Springfield, for a few days, at least, is the spiritual center of the nation and the world," Governor Horner said. "And all because Lincoln made Springfield his home. Memorializing his birthday anniversary is like memorializing an intimate friend.

"While many of his famous speeches were made here, one of his greatest was given in Pennsylvania on the battlefield of Gettysburg in 1863. The contacts of Lincoln and Pennsylvania were many."

Governor Horner introduced Governor Earle as a diplomat as well as a noted speaker, comparing him with Lincoln in that both never forgot the common man.

Speaking of Lincoln's attitude toward the supreme court, Governor Earle said: "And who was Lincoln quoting but another great American —Thomas Jefferson. In that speech Lincoln was quoting from a letter in which Jefferson had written:

"'To consider the judges as the ultimate arbiters of all constitutional questions is a very dangerous doctrine indeed, and one which places us under the despotism of an oligarchy.'

"You hear that and you ask what would Lincoln do were he president today? And the answer flashes like lightning: the same as President Roosevelt is doing."

Continuing in the same vein, Governor Earle declared: "But if anyone might think it a mere passing remark, in his address at Cooper Union in New York, he referred to the supreme court as "presumptious" and "impudently absurd."

"And again he is said to have compared the principles which these other great leaders expounded."

Warming up to his subject, "From Chattel Slavery to Wage Slavery," Governor Earle continued, "And here at his home and tomb we can find no more fitting honor for him than to say that in our day his light has not gone out. We are still pioneering. Indeed, we are still traveling trails of politics and economies lighted by the Lincoln torch.

"Ask any American child what two things Lincoln will be ever remembered for. He will tell you, Lincoln saved the union and he freed the slaves.

"We are still saving the union and still freeing the slaves.

"I look about the state of Pennsylvania and find everywhere underpaid workers—miners, factory workers, skilled men. What can we do about them?

"I look about and see the farmers of Pennsylvania and Illinois burdened by debt and beset by the danger of an industrial depression which will destroy the buying power of his customers. What can we do about it? The individual states have no more power, individually, to balance a national economy than they have power, individually, to repel a powerful foe in war.

"But the federal government can do it. Just as our founders set up this nation to guard against the foe without, so must the federal government now guard against the foe within. The federal government can establish national minimum wage and maximum hour laws that will work. In our day, as in Lincoln's, the federal union is our refuge and our hope.

"In the spirit of Lincoln, let us close that yawning gulf between things as they are and things as they should be. We need action and more action. Fellow Americans, let us drive forward."

Talks on "Lonely Lincoln"

Rev. Rice, introduced by Governor Horner as an enthusiastic collector of Lincoln data and an author of numerous religious books, spoke on "Lonely Lincoln." Rev. Rice has been pastor of the Metropolitan church for the past 25 years.

"There was something strange about him," Rev. Rice said. "He was a common man and yet hard to get to. He had no family tree. Yet he turned out to be one of the greatest men that ever walked across this continent.

"No man has ever mastered as difficult a group as was his cabinet, and yet he did it. Each member thought they were greater than he and they only served on the cabinet 'for their country's sake.' He had no associates.

"He left no successors. His place will never be taken by another. His very crudeness is a part of him, making him the Great Commoner."

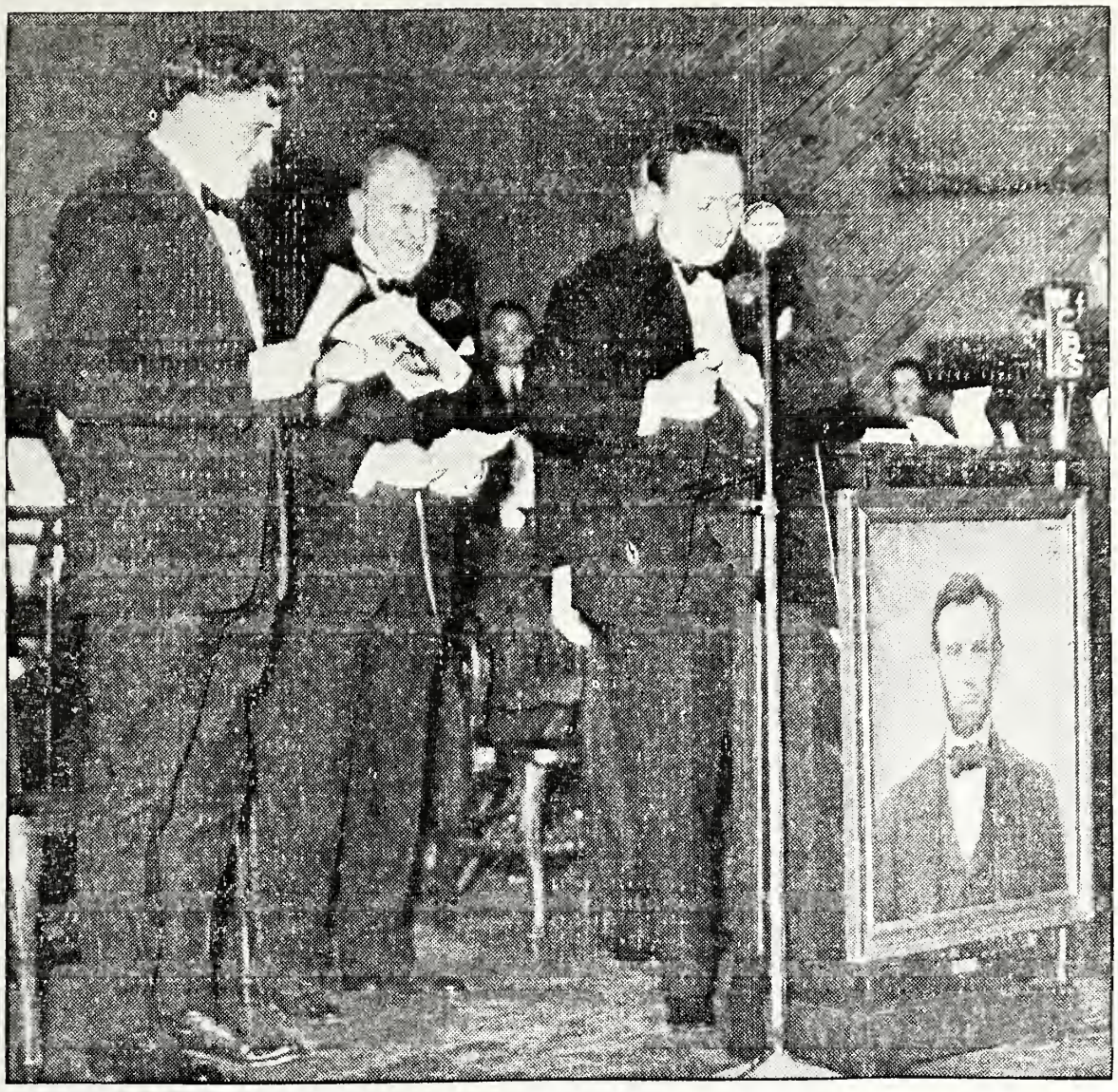
The invocation was given by Rev. James A. Griffin; the benediction by Rev. Hudson H. Pittman, pastor of the First Congregational church.

sive choruses from the Messiah, by Handel, sung by the combined choirs of Sangamon county, under the baton of William Dodd Chenery. The music, that would tax the skill of old-time professional orchestras, was played with amazing accuracy and fine intonation.

The Mid-Day Luncheon club annual events have brought to notice many excellent groups of chorus singers in past years, and last night excelled all previous ensembles both in number of singers and in merit of performance. Members of the many choirs of Springfield were amply assisted by the High School A Cappella choir of seventy-five voices, that, under their director, E. Carl Lundgren, has been awarded the high honor of an invitation to represent the state of Illinois at the North Central States Educators' conference to be held in Minneapolis the first week in April. Another fine group assisting was the City Water, Light and Power chorus, director, Norman Davis.

The Illinois slogan song, "Glorious Illinois," arranged by William Dodd Chenery for patriotic occasions, was also listed, and in this number the

Pennsylvania Governor Addresses Lincoln Day Gathering



Gov. George H. Earle, right, is shown addressing the large Lincoln day gathering held at the Springfield high school last night. At the left is Rev. Melton S. Rice, the other speaker of the evening, with Gov. Henry Horner in the center.

mented: 'The supreme court has got the doctrine of popular sovereignity down as thin as soup that was made by boiling the shadow of a pigeon that had starved to death.'

Praises Roosevelt

"I am amused somewhat by the reactionaries and standpatters who today are condemning President Roosevelt for his altogether fair and frank method of calling a halt to the supreme court in its assumption of control over congress.

"They remind me of that definition of a conservative—a man who worships dead radicals."

"Lincoln had the courage to warn his fellow citizens of the presumptions of the supreme court," Governor Earle stated, "as Jefferson and Jackson before him, and Theodore Roosevelt after him.

"Lincoln, you may remember, added to the number on the supreme court, increasing it by one, while President Grant increased it later.

"And thank God, President Franklin Delano Roosevelt has inherited the courage of earlier great Americans. He is now putting into action

Eminently appropriate for the Lincoln anniversary observance of the Mid-Day Luncheon club was the outstanding musical portion of the program. The organist of the Cathedral of the Immaculate Conception, Mario Varchi, opened the ceremonies with the brilliant "Polonaise Militaire" by Chopin, at the grand piano on the stage, and powerfully sustained the orchestra and chorus in the concerted numbers. As postlude he played "March of Glory" by Romanoff.

Youth contributed its quota in furnishing twenty-five or more of the most expert players from the Springfield High School Orchestra ensemble, directed by the supervisor of instrumental music in the public schools, Clarence F. Sauer. They played the original "President's March," Hail, Columbia, first played when George Washington crossed the river at Trenton on his way to New York for his first inaugural, while the guests of honor were being escorted to the stage. Their remarkable feat, however, was in furnishing the accompaniments for the three mas-

audience also sang. Springfield has dispelled the old-time fallacy that "Star-Spangled Banner" is unsingable. Last night it was sung with a zest and spirit that swept every voice in the room along with irresistible fervor.

Following the singing of the "Star Spangled Banner," Montgomery S. Winning, president of the Mid-day Luncheon club presented Governor Horner as chairman.

On the speakers platform were Mayor John W. Kapp, Brigadier General Richings Shand, Rev. H. H. Pittman, Governor Horner, Mr. Winning, Rev. Griffin, Governor Earle, Rev. Rice and Adj. General Carlos E. Black.

Prior to the program a reception for the guest speakers was held at 7:30 p.m. in the high school office.

IUIS POST-DISPATCH

EARLE QUOTES LINCOLN, DEFENDING COURT PLAN

Governor Says in Springfield Address Emancipator Would Do Same as Roosevelt.

By the Associated Press.

SPRINGFIELD, Ill., Feb. 12.—Gov. George H. Earle of Pennsylvania in an address before the Mid-Day Luncheon Club last night on the eve of the 128th anniversary of Abraham Lincoln's birth, recalled some of Lincoln's statements, in referring to President Roosevelt's proposal to enlarge the Supreme Court.

Gov. Earle, a Democrat, said that on July 7, 1858, Lincoln warned citizens of Springfield that 'to accept supinely the power claimed for the Supreme Court would'—and I quote—'reduce us to the despotism of an ligarchy.'" The Governor added:

"In that speech Lincoln was quoting from a letter ln which Jefferson had written:

"'To consider the judges as the ultimate arbiters of all constitutional questlons is a dangerous doctrine, indeed, and one which places us under the despotism of an oligarchy.'

Says Lincoln Would Do Same.

"You ask what would Lincoln do were he President today? The answer flashes llge llghtning.

"The same as President Roosevelt is doing."

The Pennsylvanian said some time after the Dred Scott decision, Lincoln called the Supreme Court "presumptious" and "impudently absurd" in an address at Cooper Union in New York. Lincoln and Grant increased the court's membership, he added, and Mr. Roosevelt "is now putting into action the principles which these great leaders expounded."

When the Federal Government enlarged its powers to "catch up with the march of economic development," Earle said, it was stayed by a "volce that called itself sacred." He added:

"This volce cried 'halt!' You cannot save the American miner because mining is a local matter. You cannot save the American worker because manufacturing is a local matter. You cannot save the American farmer because agrlculture is a local matter.

"It was to no avail to polnt out that the 'local' industries of Pennsylvania drew their raw materials from 48 states. It was a waste of breath to show our wheels spun only wtlh the dollars of customers in Georgia, Oregon, Texas and Maine. America was supposed to sit patiently by the roadside and starve wlthln sight of green pastures."

"What," Gov. Earle asked, "would Lincoln have answered to such a court?

Quotes From Lincoln Address.

"Let me give more fully his answer when he referred to the Dred Scott case in his first inaugural. I quote his none too flattering opinion:

"'The candid citizen must confess that, lf the policy of the Government, upon vital questions affecting the whole people, is to be irrevocably fixed by the decisions of the Supreme Court, the instant they are made, in ordinary litigation between the parties in personal actions, the people will have ceased to be their own rulers, having to that extent resigned their Government into the hands of that eminent tribunal.'"

Gov. Earle said in an interview "the United States Supreme Court has been on a sit-down strike for many years."

"A reactionary majority in the Supreme Court of the United States has concerned itself with legal technicalities," Gov. Earle said, "and not with the administration of justice and fair play to the majority of the American people.

"The condition had to end, and the sooner the better. The faults of the court have been the lack of perspective in men who put law above justice. They see only the trees and miss the forest."

Illinois State Journal 2/12/37

QUOTES FROM LINCOLN ON INCREASE IN COURT

Governor Earle Contends His Position Same as That of Roosevelt.

SPRINGFIELD, Ill. (AP). Gov. George H. Earle of Pennsylvania contended that if Abraham Lincoln were president now he would seek reorganization of the U. S. supreme court. In an address prepared for delivery before the midday luncheon club on the eve of the 128th anniversary of the Emancipator's birth he recalled some of Lincoln's statements in referring to President Roosevelt's controverted proposal to enlarge the high tribunal.

Governor Earle, a democrat, said that on July 7, 1858, Lincoln warned citizens of Springfield that "to accept supinely the power claimed for the supreme court would—and I quot—'reduce us to the despotism of an oligarchy.'"

The governor added: "In that speech Lincoln was quoting from a letter in which Jefferson had written: 'To consider the judges as the ultimate arbiters of all constitutional questions is a very dangerous doctrine indeed, and one which places us under the despotism of an oligarchy.'

"You ask what would Lincoln do were he president today? The answer flashes like lightning: The same as President Roosevelt is doing."

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"What," Governor Earle asked, "would Lincoln have answered to such a court? Let me give more fully his answer when he referred to the Dred Scott case in his first inaugural. I quote his none too flattering opinion: 'The candid citizen must confess that, if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by the decisions of the supreme court the instant they are made, in ordinary litigation between the parties in personal actions, the people will have ceased to be their own rulers, having to that extent resigned their government into the hands of that eminent tribunal."

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father of five children, wrote a note saying "You will find my body floating down the ocean" and disappeared from his home. Mrs. Luscher said she found the note shortly after her husband returned from a county relief station, where, she told police, he had failed to get a $3 weekly order for groceries.

CLAPPER—

Roosevelt's Proposal Is an Attempt to Put Heat on Supreme Court

By RAYMOND CLAPPER

WASHINGTON, Feb. 12.—Just to keep the argument straight, President Roosevelt's Supreme Court proposal is not a proposal to change our form of government, or to expand the Federal Constitution at the expense of the states, or to curb the power of the Supreme Court. Good or bad, it is essentially an attempt to put the heat on the court.

The entire court was appointed before Roosevelt came into office, and before the depression. A majority of the court, usually five or six, is out of step with the minority of the court and with the two elected branches of the Government and, it would seem therefore, also out of step with the sentiment of the country as registered in the last three elections.

Roosevelt's contention is that there is sufficient power within the Constitution now to enable the Federal Government to do all that he wishes to do with regard to social and economic legislation. For all practical purposes the could ride on the opinions of the present minority of the court.

Tries to Reverse Balance of Court

Seeing that these eminent authorities on the Constitution find sufficient power there for his purposes, he has set about to reverse the balance of the court, to reverse its dominant political philosophy by transporting the present minority into a majority.

Many are horrified at this attempt to reverse the Supreme Court. Today particularly they are asking, what would Lincoln do?

* * *

What did Lincoln do? He intensely disapproved of the Dred Scott decision. True, he did not go as far as the leading Republican organ of that day, the New York Tribune, which said the decision was "entitled to just as much moral weight as would be the judgment of a majority congregated in any Washington barroom," and that the verdict was seven to two, "five slaveholders and two doughfaces making up the seven."

No, Lincoln did not go that far. But he did say:

"We think the Dred Scott decision is erroneous. We know the court that made it has often overruled its own decisions., and we shall do what we can to have it overrule this."

Again, he said: "The candid citizen must confess that if the policy of the Government upon such vital questions affecting the whole people is to be irrevocably fixed by the decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having, to that extent, practically resigned their government into the hands of that eminent tribunal."

Again: "By general law, life and limb must be protected, yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb."

Lincoln Simply Ignored Justices

Lincoln didn't try to reverse the Dred Scott decision by packing the Supreme Court. No. One morning he just decided to ignore the Supreme Court and he issued the emancipation proclamation, leaving it to his successors to get around to amending the Constitution to conform.

Roosevelt hasn't such a grave crisis as Lincoln had. So he doesn't defy the court. Neither does he follow Jackson, who said: "John Marshall has made his decision; now let him enforce it." He merely tries to change the attitude of the Supreme Court by asking Congress to use its constitutional power to infuse fresh blood.

— Clapper's Column —

Lincoln Had Method To Get Around Court

Great Emancipator, Like Roosevelt, Took Steps He Considered Best for Nation's Welfare

By RAYMOND CLAPPER

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"We think the Dred Scott Decision is erroneous. We know the court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this. We offer no resistance to it. . . .

Binding? No!

"IF this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectations, and with the steady practice of the departments throughout all our history, and had been in no part based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and reaffirmed through a course of years, then it might be, perhaps would be, factious—nay, even revolutionary—not to acquiesce in it. But when, as is true, we find it lacking in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not yet having quite established a settled doctrine for the country."

Again, he said: "The candid citizen must confess that if the policy of the government upon such vital questions affecting the whole people is to be irrevocably fixed by the decisions of the Supreme Court . . . . the people will have ceased to be their own rulers, having, to that extent, practically resigned their government into the hands of that eminent tribunal."

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FRIDAY, FEBRUARY 12, 1937

LINCOLN, LIKE ROOSEVELT, HAD COURT PROBLEM

Civil War President Was in Favor of Forcing Justices To Change Minds

See Raymond Clapper's column on Page 2.

Special to The Pittsburgh Press

WASHINGTON, Feb. 12—Abraham Lincoln, like President Roosevelt, had definite opinions on curbing the powers of the Supreme Court.

History students today culled passages from the writings of the Civil War President, which they believed could be applied to the current controversy on judicial reorganization.

In his first inaugural address, President Lincoln said:

"The candid citizen must confess that if the policy of Government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."

In the backwash of passions aroused by the famous Dred Scott decision in 1856, President Lincoln declared that the nation's judges were "as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps." He was determined that this decision should not stand.

"Somebody has to reverse that decision, since it is made; and we mean to reverse it, and we mean to do it peaceably," President Lincoln declared during one of his debates with Stephen A. Douglas.

In his famous Springfield speech of 1857, discussing the Dred Scott decision, President Lincoln said the Supreme Court had often overruled its own decisions, and efforts should be made to follow such a procedure in upsetting that ruling.

"We think its decisions on constitutional questions, when settled, should control not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution, as provided in that instrument itself," President Lincoln said. "More than this would be revolution.

"But we think the Dred Scott decision is erroneous. We know the court that made it has often overruled its own decisions, and we shall do what we can to have it overrule this. We offer no resistance to it.

"Judicial decisions are of greater or less authority, as precedents according to circumstances. That this should be so, accords both with common sense and the customary understanding of the legal profession.

"If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part based on assumed historical facts, which are not really true; or if wanting in some of these, it had been before the court more than once, and had there been affirmed and reaffirmed through a course of years—it then might be, perhaps would be factious, nay, even revolutionary, not to acquiesce in it as a precedent.

"But when, as is true, we find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful to treat it as not having yet quite established a settled doctrine for the country."

Lincoln, Roosevelt Court Stand Compared by Earle

See the article by Dr. Newton on Page 20, and the two stories about President Lincoln on Page 41.

By The United Press

SPRINGFIELD, Ill., Feb. 12—Patriotic and political organizations paid tribute to the memory of Abraham Lincoln today in pilgrimages to his home, his tomb, and the village where he spent his boyhood.

Springfield, rich in Lincoln lore, paused in its routine business and state affairs to become the hub of celebrations in observance of the 128th anniversary of the "great emancipator."

Abraham Lincoln came to Sangamon County 100 years ago, to begin the career which led to the Presidency. He was buried here, though his body now lies in Washington.

In the ranks of those who paid tribute were Harry W. Colmery, national American Legion commander; Mrs. Oscar W. Hahn, Legion Auxiliary commander; former Secretary of Commerce Charles Nagel; Gov. George H. Earle of Pennesylvania, and Dr. M. S. Rice, prominent Detroit minister.

Members of the Grand Army of the Republic, the American Legion and the Woman's Relief Corps paraded together to President Lincoln's tomb.

Gov. Henry Horner of Illinois led a procession from Lincoln's Springfield home, where he started his political career, to New Salem, where Lincoln clerked in a country store.

Last night Gov. Earle, speaking at a Lincoln meeting, said Abraham Lincoln, faced by modern problems, would do "the same of President Roosevelt is doing."

He cited President Roosevelt's recent Supreme Court proposal, and quoted President Lincoln as asying:

"To consider the judges as the ultimate arbiters of all constitutional questions is a very dangerous doctrine indeed, and one which places us under the despotism of an oligarchy."

President Lincoln, Gov. Earle said, referred to the Supreme Court of his time as "presumptuous" and "impudently absurd."

Pittsburgh Press 2/12/37

Chicago Herald & Examiner 2/13/37

Glenn Frank

Cites Lincoln Against Court Changes

ST. PAUL, Feb. 12.—(AP)—Dr. Glenn Frank, former president of the University of Wisconsin, in an address tonight said degeneration of American politics into "a slugging match between ignorant change and ignorant opposition to change" must be prevented.

Speaking before the Lincoln Republican Club, Dr. Frank quoted a passage from Lincoln which included:

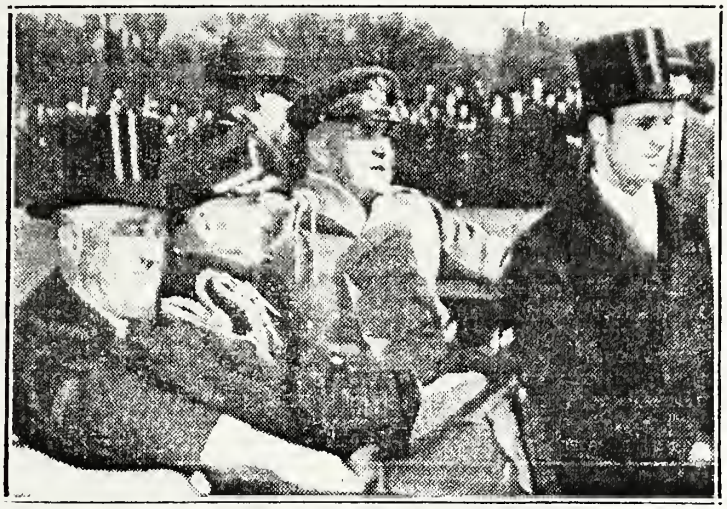
"If we would supplant the opinions and policy of our fathers in any case, we should do so upon evidence so conclusive and argument so clear that even their great authority, fairly considered and weighed, cannot stand."

Then, alluding to President Roosevelt's proposed federal court revision, Dr. Frank said:

"I commend the reading of that quotation before both houses of Congress when the proposal is presented for consideration."

Lincoln's Court War Recalled on Birthday

The struggles of Abraham Lincoln, the man of destiny who fought Supreme Court interference as well as Confederate armies to win the Civil War, were recalled yesterday by speakers at a number of Lincoln's Birthday ceremonies here.



(By Acme)

President Roosevelt in car with aids and son, James (right), on way to Lincoln Memorial in Washington yesterday. (Other picture p. 18.)

Lincoln's war-time difficulties were compared to those of President Roosevelt today by Dr. James Lukens McConaughy, head of Wesleyan University and president of the Association of American Colleges, in an address before the Advertising Club.

Lincoln, too, was called a "dictator," the educator reminded his audience. And Lincoln had such difficulties with the Supreme Court that he did not regard that body with the veneration of the current G. O. P.

Dr. McConaughy quoted the following opinion of the martyred President:

"If the policy of the Government on vital questions affecting the welfare of the whole people had to be irrevocably fixed by decisions of the Supreme Court, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that tribunal."

"Lincoln regretted the Dred Scott decision," Dr. McConaughy continued. "He believed that an emergency then existed, as does our President today, and that great powers must rest in the hands of the President, and that states' rights must be subordinate to those of the nation.

"Lincoln clashed with the then Chief Justice, who said that Lincoln was going beyond his powers in permitting conscription, and in other acts. And the Chief Justice was right and Lincoln was wrong, though perhaps justified by the emergency of that time. The Chief Justice died in indignity, believing he was despised by his country. His successor was Lincoln's most intimate friend."

Lincoln, if in the White House today, would say one of our greatest problems is to take care of the needy, the speaker continued. Lincoln's pride, however, was in American initiative, ambition and willingness to sweat, McConaughy added.

He counseled tolerance to the bitter critics of the man holding Lincoln's job today.

"I think Lincoln would say at this time, when there is just a little strain in the country, something about helping us to believe in the integrity and honesty of those who differ with us," McConaughy observed.

"Millions of people pray for Lincoln's assassination, yet he never showed rancor. He said: 'With malice toward none, with charity toward all," and he would counsel all Americans to try and remember that we are a mingling of elements and he would say, 'Respect the man who differs with you."

Mayor LaGuardia, receiving a gold medallion and memorial voted him by the students at Abraham Lincoln High School, Brooklyn, likewise paralleled Lincoln and Roosevelt. The award went to the Mayor as the citizen who performed the greatest service for New York City in the past year.

"Lincoln would be horrified at the long lines of citizens seeking relief if he were here today," said LaGuardia. "He would see the necessity of improving labor conditions. He, however, would find himself in the same position as our President today, blocked by the Supreme Court."

Lincoln the Sympathetic

A Rugged Personality Which Was Genuinely Beautiful Because of Its Latent Love and Sympathy Ever Called to Practical Expression When Most Needed

IN spite of his rugged exterior Abraham Lincoln possessed a nature in which love and sympathy had a very genuine part. Maybe they did not dwell on the surface. He certainly did not wear his heart on his sleeve. But in times of emergency and crisis those latent springs of sympathy never failed to well-up to accomplish their important and God-inspired purposes.

Many stories are told to show Lincoln's heartfelt sympathy for his soldiers. Here's a narrative which concerns his interview with William Scott, a boy from a Vermont farm, who, after marching forty-eight hours without sleep, volunteered to stand guard for a sick comrade. Weariness overcame him, and he was found asleep at his post, within gunshot of the enemy. He was tried and sentenced to be shot.

Mr. Lincoln heard of the case and went himself to the tent where young Scott was kept under guard. He talked to him kindly, asking about his home, his schoolmates, and particularly about his mother. The lad took her picture from his pocket and showed it to him without speaking. Mr. Lincoln was much affected. As he rose to leave he laid his hand on the prisoner's shoulder:

"My boy," he said, "you are not going to be shot tomorrow; I believe you when you tell me that you could not keep awake. I am going to trust you and send you back to your regiment. Now, I want to know what you intend to pay for all this?"

The boy, overcome with gratitude, could hardly say a word, but crowding down his emotions, managed to answer that he did not know. He and his people were poor. They would do what they could. There was his pay and a little in the savings bank. They could borrow something by a mortgage on the farm. Perhaps his comrades would help. If Mr. Lincoln would wait until payday, possibly they might get together $500 or $600. Would that be enough?

The kindly President shook his head: "My bill is a great deal more than that," he said. "It is a very large one. Your friends cannot pay it nor your family, nor your farm. There is only one man in the world who can pay it, and his name is William Scott. If from this day on he does his duty, so that when he comes to die he can truly say, 'I have kept the promise I gave to the President—I have done my duty as a soldier,' then the debt will be paid."

Young Scott went back to his regiment, and the debt was fully paid, and a few months later, for he died in battle.

* * * *

● Dr. Jerome Walker of Brooklyn recalled how Mr. Lincoln once administered to him a mild rebuke. The doctor was showing Mr. Lincoln through the hospital at City Point.

"Finally, after visiting the wards occupied by our invalid and convalescing soldiers," said Dr. Walker, "we came to three wards occupied by sick and wounded Southern prisoners. With a feeling of patriotic duty, I said: 'Mr. President, you won't want to go in there; they are only rebels.'

"I will never forget how he stooped and gently laid his large hand upon my shoulder and quietly answered, 'You mean Confederates!' And I have meant Confederates ever since.

"There was nothing left for me to do after the President's remark but to go with him through these three wards; and I could not see but that he was just as kind, his hand-shakings just as hearty, his interest just as real for the welfare of the men as when he was among our own soldiers."

* * * *

● An instance of young Lincoln's practical humanity at an early period of his life is recorded as follows: One evening, while returning from a "raising" in his wide neighborhood, with a number of companions, he discovered a straying horse, with saddle and bridle upon him. The horse was recognized as belonging to a man who was accustomed to excess in drink, and it was suspected at once that the owner was not far off. A short search only was necessary to confirm the suspicions of the young men.

The poor drunkard was found in a perfectly helpless condition upon the chilly ground. Abraham's companions urged the cowardly policy of leaving him to his fate, but young Lincoln would not hear to the

proposition. At his request, the miserable sot was lifted to his shoulders, and he actually carried him eighty rods to the nearest house. Sending word to his father that he should not be back that night, with the reason for his absence; he attended and nursed the man until the morning, and had the pleasure of believing that he had saved his life.

* * * *

● Lincoln often showed his love for little children.

He would shake hands with thousands of people, seemingly unconscious of what he was doing, murmuring some monotonous salutation, his eye dim and thoughts far away, until a familiar face, or the sight of a little child would focus his attention.

"Hurrah for Mist' Linthon!" a small citizen lisped as he came up, convoyed by his proud parent. "Hurrah for Mister You!" the President responded, gathering him in his arms, and giving him a mighty toss toward the ceiling.

* * * *

● But it was in dealing with women in distress, particularly with women in the humbler walks of life, that his kindness was most marked.

"It is hard to portray the exquisite pathos of Mr. Lincoln's character, as manifested in his acts from time to time," Mr. James Speed once said in telling of an incident that had come to his knowledge. It was at the end of one of the daily receptions.

"Is that all?" Mr. Lincoln asked.

"There is one poor woman here yet, Mr. President," Edward, the colored usher, replied. "She has been here for several days and has been crying and taking on, and hasn't had a chance to come in yet."

"Let her in," said Mr. Lincoln.

The woman told her story. It was just after the battle of Gettysburg. She had a husband and three sons in the army, and was left alone to fight the hard battle of life. At first her husband had sent her regularly a part of his pay, and she had managed to live. But gradually he had yielded to the temptations of camp life, and no more remittances came. Her boys had

(Continued on page 14.)

LINCOLN THE SYMPATHETIC

(Continued from page 4.)

become scattered among the various armies, and she was without help. Would not the President discharge one of them, that he might come home to her?

While the recital was going on the President stood before the fireplace, his hands crossed behind his back, his head bent in earnest thought. When the woman ended, and waited for his reply, his lips opened, and he spoke, not as if he were replying to what she said, but rather as if he were in abstracted and unconscious self-communion.

"I have two, and you have none."

That was all he said. Then he walked across to the writing table, and taking a blank card, wrote upon it an order for the son's discharge. Upon another paper he wrote out in great detail where she should present it, to what department, at what office, and to what official; giving her such directions that she might personally follow the red-tape labyrinth.

A few days later, at a similar close of the general reception for the day, Edward said, "That woman, Mr. President, is here again, and still crying."

"Let her in," said Lincoln. "What can be the matter now?"

Once more he stood in the same spot, before the fireplace, and for the second time heard her story. The President's card had been a magic passport. It had opened forbidden doors, and softened the sternness of official countenances. By its help she had found headquarters, camp, regiment and company. But instead of giving a mother's embrace to a lost son restored, she had arrived only in time to follow him to the grave. The battle of Gettysburg, his wounds, his death in the hospital—the story came in eloquent fragments through her ill-stifled sobs. And now, would the President give her the next one of her boys?

Once more Mr. Lincoln responded with sententious curtness, as if talking to himself:

"I have two, and you have none."

Sharp and rather stern, the compression of his lips marking the struggle between official duty and human sympathy, he walked once again to his little writing table and took up his pen to write for the second time an order which should give the pleading woman one of her remaining boys. The order was written and signed. The President rose and thrust it into her hand with the choking exclamation, "There!" and hurried from the room, followed, so long as he could hear, by the thanks and blessing of an overjoyed mother's heart.

Presidents vs. High Court

LINCOLN WON 3 TILTS WITH TANEY

Army, by Authority of President, Ignored Writ Issued by Chief Justice

VACANCIES FILLED

BY MORGAN M. BEATTY

Washington, Feb. 17—(AP)—Abraham Lincoln got all the breaks in his struggles with the Supreme Court, and he used them to gain three complete victories.

The groundwork for Lincoln's belligerence, ironically enough was laid by the Supreme Court itself in the ill-starred Dred Scott decision four years before the Civil War.

The ruling was written by the same Roger B. Taney that Jackson had elevated to the highest tribunal 20 years before. Taney was close to his 80th year and the possessor of sound mental and physical health when his decision was written that left Dred Scot in servitude and, in effect, validated slavery north of "36-30" on the ground that the Missouri Compromise was unconstitutional.

Lincoln Assails Decision

Lincoln, a Senatorial candidate, caught the issue early out in Illinois and used it to the hilt against Douglas in their famous debates. The lanky Illinois lawyer announced boldly the Nation should decline to abide by the decision.

"We think the Court's decisions, when fully settled, should control not only the particular cases decided but the generaly policy of the country," he argued. "But we think the Dred Scott decision is erroneous."

The towering Taney, austere, now somewhat stooped, but firm, silently held his ground, and it is small wonder that the war was only a few months old before he ran into trouble with the equally determined Lincoln.

Taney's Writ Ignored

The first skirmish came when the military forces arrested John Merryman and imprisoned him in Fort McHenry, near Baltimore, on charges of raising rebel forces.

The prisoner asked for a writ of habeas corpus and got it from Taney, who was sitting as Circuit Court Judge. By authority of Lincoln, the Army declined to produce the prisoner. Promptly Taney held the Fort McHenry command in contempt. This decision likewise was ignored.

The Chief Justice then proceeded to write an opinion pointing out that the civil courts were still clothed with full authority. He sent a copy to the President.

Shortly after he took this decisive step, the 84-year-old Justice remarked on leaving home for court one day:

"It is likely I will be imprisoned at Fort McHenry myself before nightfall, but I am going to court to do my duty."

Lincoln merely obtained an opinion from his Attorney General that the President, as Commander-in-Chief of the Army, was acting for the public safety. Taney's orders were ignored.

Lincoln Names Three Justices

Meanwhile, the harassed President was absorbed in the war, and allowed three vacancies to accumulate in the high tribunal by 1862.

Whatever the reason, Lincoln suddenly turned his attention to the empty seats, and sent the Senate three nominations which were approved in rapid order.

Before the court were the famous "prize cases," involving the right of the Union to blockade southern ports. When the decision came down, Lincoln's three new Justices swung the tide, and the Union won. The margin was 5-to-4.

The third and last encounter between the Lincoln Administration and the tenacious Taney was a minor difference over the deduction by the Treasury of three per cent. of the Justices' salaries—part of a Government-wide war economy measure.

Taney protested in vain.

"I see no hope," he wrote despairingly to a friend, "that the Supreme Court will ever again be restored to the authority and rank which the Constitution intended to confer upon it."

The fact remained that Lincoln gained his immediate ends—and the Supreme Court was discredited temporarily in the public eye. Years were to elapse before the greatness of Taney as a Chief Justice would be recognized.

The score of the contests between the Supreme Court and the Presidents then stood at two-all, and one draw. Washington and Jefferson had lost; Jackson and Lincoln had won.

Historians may argue at length about the draw, but the fact remains that both sides could claim a victory. The contenders were President Martin Van Buren, Jackson's political heir to the White House, and a much younger Roger B. Taney.

Van Buren charged that the court was invading Executive authority when it awarded damages to postal contractors whose contracts had been revoked by Jackson. But his pride was saived when the Justices found occasion not long afterward to assert the President's authority was inviolate in his performance of Executive duties.

(This is the third of a series of four articles.)

LINCOLN LORE

Bulletin of the Lincoln National Life Foundation - - - - - - Dr. Louis A. Warren, Editor,
Published each week by The Lincoln National Life Insurance Company, Fort Wayne, Indiana

Number 530 FORT WAYNE, INDIANA June 5, 1939

LINCOLN, STANTON, AND THE SUPREME COURT

Edwin M. Stanton has become the scapegoat for half a dozen or more schools of criticism which have singled him out as the chief instigator of several ignominious episodes which occurred during or following the Civil War. His alleged disrespect for Lincoln, the ruthless manner in which he is said to have conducted his office as Secretary of War, the much discussed injustice done to the conspirators in the assassination trial, his initiative in the procedure of the Johnston impeachment trial; all these things have been attributed to him, and now he is accused of planning and aiding in the assassination of his chief, Abraham Lincoln.

A remarkable letter has just been acquired by the Lincoln National Life Foundation which recalls again Lincoln's attitude towards his Secretary of War. Lincoln's keen appreciation of Stanton's ability and his unquestionable confidence in the unselfish and patriotic service his Secretary of War was rendering is well stated in his famous letter to James Gordon Bennett, editor of the New York Herald, in which he says, "I wish to correct an erroneous impression of yours in regard to the Secretary of War. He mixes no politics whatever with his duties."

Upon the death of Chief Justice Taney in 1864 Bishop Simpson, Governor Morton, Governor Andrews and others urged Lincoln to appoint Stanton to the Supreme Bench. Lincoln is said to have replied to Bishop Simpson: "If Mr. Stanton can find a man he himself will trust as Secretary of War I'll do it." Stanton's loyalty to the country prevented him from making further efforts to secure the appointment.

After the war was over General Grant had an occasion to write a letter to Stanton in which he said, "I cannot let the opportunity pass without expressing to you my deep appreciation of the zeal, patriotism, firmness, and ability with which you have ever discharged the duties of Secretary of War." It was left for Grant after he became President to make the appointment of Stanton to the Supreme Bench which Lincoln had been willing to do if Stanton's place could have been filled.

Stanton had burnt himself out for the country; his health was impaired and he was actually in need of some lucrative appointment. In such a state of mind he wrote the following two letters to Bishop Simpson late in the year 1869:

"Private &
Confidential

"Washington Oct 26, 1869

"My Dear Friend

"This note is accompanied by the regret of Mrs. Stanton & myself that we are unable to attend your daughters marriage, and by our good wishes for her & her husbands happiness. What I add herein, you will please to consider as ***strictly personal*** and confidential.

"You have been aware of my infirm health during the past year, and will be glad to know that by relaxation from labor, & travel it has very much improved so as to encourage hopes that it may be fully restored to enable me to enjoy some years longer of usefulness. But this may depend upon how I am employed. When I left my private pursuits for the public interest I had the best professional practice in the United States, was rapidly accumulating wealth, & living at ease. My expenses above my salary exhausted my surplus resources and with years advanced, and diminished strength I must toil for my living. There is a vacancy on the Supreme Bench for which I have adequate physical power, & so far as I can judge of my intellect, its powers are as acute & vigorous as at any period of my life—and perhaps more so.

"General Grant in justice to the country, to himself & to me, ought to give *me* that appointment. So far as relates to himself not all his friends in the United States, upheld & advanced him as firmly & successfully during the war as I did in my official acts. There is no man who would uphold the principles of the war on which his usefulness & fame must *rest*, with more or equal vigor from the Bench. The Bench has now a great part to play in history during his administration, and upon no experienced resolute jurist, can he rely with greater confidence. My appointment would gratify the great mass of republicans, & rally them around Grant —it would be considered as disinterested, unpurchased, and a sure proof of the Presidents loyal determinations. My residence here in the District is also a recommendation being free from geographical discriminations.

"I have said ***nothing*** to ***General Grant*** on the subject and ***shall not***—but I would be glad to have ***you*** talk with him fully & freely and report to me his views on this question. To me it may in considerable degree be a question of life—it certainly is of health, for I must go to the Bench or Bar. His name & fortune he owed at a critical moment to me. He can preserve me to my family under Providence. I have communicated to you more fully than ever before to mortal man, & in confidence you will do what seems right of which you are a better judge than I am.

"Hoping to see or hear from you soon I am ever

"Yours Edwin M Stanton"

"Rt Rev. Bishop Simpson"

"Washington Nov 3, 1869

"My Dear Friend

"I am under much obligation for your note received this morning. When I heard that your daughter and her husband were to start so soon for Europe it caused me much regret to have troubled you with any affair of my own, but I hope it gave you no inconvenience. The result of your conference is very plain to me, and gives me no surprise, being what I had expected, and I am quite sure that you will conform to my wish that the matter be strictly confidential and confined to your own bosom. In regard to Childs—who for several years has been an active bitter enemy of mine because of my annulling a bargain between him and General Cameron which I disapproved—he doubtless knows the Presidents purpose, and my health is made an evasive excuse by Childs for a predetermined purpose, influenced by quite different consideration from that assigned. I shall take no step in the matter, and no allusion to it has ever been made except in my letter to you.

"So far as my health is concerned it is in the hands of Providence, and as respects Genl Grant he will be influenced by his judgment as to his own interest.

"I regretted that it was not in my power to leave home to witness your daughters marriage ceremony and make her husbands acquaintance. I hope they have a pleasant location in Italy. Their residence in that favored climate may tempt you to take the relaxation of a visit where there is so much of interest and thus guard your own health from the dangers that I have apprehended you were incurring by too much labour and care.

"With many thanks and most sincere affection I am

"Truly yours

"Edwin M Stanton"

"Rt Rev Bishop Simpson"

Due largely to Bishop Simpson's interest the apparent objection to Stanton was waved aside and on Sunday, December 19, President Grant and Vice President Colfax called on Grant and advised him that his appointment to the Supreme Bench would be confirmed the following day, and it was done. On December 22 Grant signed the commission, but Stanton never saw it, as a relapse brought on by over-exertion resulted in his death on December 24. If Stanton had lived to receive this gracious Christmas gift it would have been the most prized possession of his entire experience, but even this was denied this most abused and misrepresented public servant.

MEMBERS OF THE SUPREME COURT OF THE UNITED STATES

CHARLES EVANS HUGHES, CHIEF JUSTICE, was born at Glens Falls, N. Y., April 11, 1862. Appointed Associate Justice, May 2, 1910, and assumed duties October 10, 1910. Resigned June 10, 1916. Appointed Chief Justice, February 3, 1930 by President Hoover, and took his seat February 24, 1930.

JAMES CLARK MCREYNOLDS, ASSOCIATE JUSTICE, was born in Elkton, Ky., February 3, 1862. Appointed Associate Justice, August 29, 1914 by President Wilson and took his seat October 12, 1914.

PIERCE BUTLER, ASSOCIATE JUSTICE, was born March 17, 1866, in the township of Waterford, Dakota County, Minn.; was nominated by President Harding to be Associate Justice on November 23, 1922 and took his seat January 2, 1923.

HARLAN F. STONE, ASSOCIATE JUSTICE, was born in Chesterfield, N. H., October 11, 1872. Was nominated Associate Justice by President Coolidge January 5, 1925, and entered upon the duties of that office March 2, 1925.

OWEN J. ROBERTS, ASSOCIATE JUSTICE, was born in Philadelphia, Pa., May 2, 1875. Was nominated Associate Justice of the Supreme Court by President Hoover, May 9, 1930, and entered upon the duties of that office June 2, 1930.

HUGO L. BLACK, ASSOCIATE JUSTICE, was born in Clay County, Ala., February 27, 1886. Was nominated by President Roosevelt, August 12, 1937, as an Associate Justice, and took his seat October 4, 1937.

STANLEY REED, ASSOCIATE JUSTICE, was born in Mason County, Kentucky, December 31, 1884. He was nominated by President Roosevelt January 15, 1938, as an Associate Justice, and took his seat January 31, 1938.

FELIX FRANKFURTER, ASSOCIATE JUSTICE, was born in Vienna, Austria, Nov. 15, 1882; brought to the United States in 1894. Was nominated by President Roosevelt, January 5, 1939, as an Associate Justice, and entered upon the duties of office January 30, 1939.

WILLIAM O. DOUGLAS, ASSOCIATE JUSTICE, was born in Maine, Minnesota, October 16, 1898. He was nominated as an Associate Justice by President Roosevelt, March 20, 1939, and took his seat April 17, 1939.

The Supreme Court

of the

United States

The Court and Its Work

OUR government is divided into three separate and equal branches, so constituted that each functions freely within the limits of its constitutional authority, though open to check by one or both of the others if attempt be made to exercise powers not granted by the Constitution. The judicial branch, one of these three, embraces a Supreme Court, created by the Constitution, and inferior Federal Courts established by the Congress.

Congress determines the number of members constituting the Supreme Court and fixes their salary. They are nominated and, "by and with the advice and consent of the Senate," appointed by the President to hold their offices during good behavior. To insure, in a measure, their independence the Constitution provides that they "shall . . . receive . . . a compensation which shall not be diminished during their continuance in office."

The term of the Court begins on the first Monday in October, the day fixed by law, and usually ends about the first of June. Varying somewhat from year to year, the eight months are ordinarily about evenly divided between the hearing of cases and intervening recesses. Although not governed by unchanging rule, the sittings customarily last two weeks, during which time some twenty-five or thirty cases, on an average, are either orally argued or submitted on briefs. The study of these cases by the Justices in preparation for their discussion and disposal in conference leaves but little time for the writing of opinions, so that this part of the Court's work must be done in the alternate two-week periods of recess.

The daily sessions, which are open to the public, begin at noon and last until four-thirty, with a half hour's intermission for luncheon beginning at two o'clock.

The Court holds no public session on Saturdays. On this day the Justices assemble for their weekly conference. They alone are present at these meetings. It is then that the cases which have been presented to them are discussed and voted upon.

When in session, the Court convenes promptly at 12 M., its entrance to the Chamber being formally announced by the Crier. The audience, which has arisen, remains stand-

ing as the black-robed Justices walk to their places on the Bench. As they take their seats, the Crier's voice is raised once more as he impressively calls, "Oyez, Oyez, Oyez! All persons having business before the Honorable, the Supreme Court of the United States are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court."

Mondays are the only days on which opinions are handed down and their delivery precedes all other business. Following opinions on Mondays, and coming before all other business on the remaining days, are motions for admission to the bar and those made in connection with cases. With these out of the way, the first case for the day is called by the Chief Justice, and unless it is disposed of in some other way, argument begins. The party responsible for bringing the case before the Court, viz. the Appellant or Petitioner, opens the argument and also has the right to close. The opposing party, i. e. the Appellee or Respondent, begins and completes his argument following the opening of his adversary. Each side is normally allowed one hour in which to present its case. As a rule this has been found time enough if the attorneys are well prepared. As the hearing of one case is completed, the next in order on the list, or "call," is heard—and so until four-thirty when the Court is formally adjourned for the day.

Some idea of the average amount of business transacted by the Court during a two weeks' sitting, and during the entire term may be gained from the following figures:

Total number of cases presented during a two weeks' sitting	25 to 30
Total number of written opinions during the Term	about 175
Total number of cases passed upon during the Term	about 1000

By the first Monday in June, all cases ready for argument have usually been heard and decided, and the Term is ended. But the work of the Justices is unceasing. Legal papers, filed during vacation, follow them wherever they may go, until duty once more calls them to the time and place appointed by law for the beginning of another Term.

The United States Supreme Court Building

THE new white marble building erected as a permanent home for the Supreme Court of the United States is located east of the Capitol, which it faces across a wide plaza. Opposite on East Capitol Street are the Library of Congress and that architectural gem, the Folger Shakespeare Library. On the north side, the wide boulevard of Maryland Avenue gives added space and perspective to one approaching the building from that direction.

One of the principal considerations touched upon in the Act of Congress authorizing the construction of this building was that it should be of a type of architecture and material to harmonize with the other buildings of the Capitol group. With this important consideration to guide them, the United States Supreme Court Building Commission was created by Act of Congress and appropriations made for purchase of a site and erection of the building. The Commission responsible for the selection of the architects, the approval of plans, the awarding of contracts, and the construction of the building, was constituted as follows:

Chief Justice WILLIAM HOWARD TAFT, *Chairman*—
following whose death the chairmanship devolved upon—

Chief Justice CHARLES EVANS HUGHES

Hon. WILLIS VAN DEVANTER, Associate Justice of the Supreme Court

Hon. HENRY W. KEYES
Hon. JAMES A. REED
Chairman and a member respectively of the Senate Committee on Public Buildings and Grounds

Hon. RICHARD N. ELLIOTT
Hon. FRITZ G. LANHAM
Chairman and a member respectively of the House Committee on Public Buildings and Grounds

HON. DAVID LYNN, Architect of the Capitol, who also acted as executive officer of the Commission.

PLANS AND MATERIALS The first contract let by the Commission was for the design. This was with Cass Gilbert and included a model to be made in plaster showing the entire exterior of the projected building. Later another contract was entered into with Cass Gilbert, Cass Gilbert, Jr. and John R. Rockart for further architectural services connected with the erection of the structure. The contract for the construction of the building was awarded the George A. Fuller Company, the lowest bidder. Upon David Lynn, the executive officer of the Commission, devolved most of the detail work incident to the contract and superintendence during the entire period of construction, and to him, acting at all times with the full cooperation of the Chairman, must be given no small part of the credit attached to the successful completion of the building.

Unfortunately, neither the first Chairman of the Commission, Chief Justice Taft, who was so instrumental in securing the prerequisite legislation, nor the architect, Mr. Cass Gilbert, who was unsparing in his devotion of time and talent to this, his greatest work, lived to see the building completed, but it stands as a lasting monument to the vision of the one and the genius of the other.

Following selection of the architects, primary questions as to the type of building, material, etc., were given careful study. The Greek style of architecture, Corinthian order, was decided upon as best harmonizing with adjacent buildings. The building was designed on a scale in keeping with the importance and dignity of the Judiciary, as one of the three equal and coordinate branches of the United States Government, and as a symbol of "the national ideal of justice in the highest sphere of activity."

The general dimensions of the foundation are 385 feet east and west and 304 feet north and south. At its greatest height, the building rises four stories above the terrace or ground floor.

Marble was chosen as the principal material to be used and three million dollars' worth of this material, gathered from foreign and domestic quarries, went into its construction. Vermont marble was used, almost exclusively, for the exterior, while the four inner courts are of crystalline flaked, white Georgia marble. Above the basement, all walls of corridors, vestibules or en-

trance halls are either entirely of creamy Alabama marble or with wainscot and base of the same. The floors in these spaces are likewise of this beautiful stone in the main story, and on the other floors, of marble, or terrazzo set off in squares by imbedded brass strips, with border of marble or terrazzo.

The wood finish in the offices throughout the building, such as doors, trim, and panelled walls, is of American quartered white oak. All floors in the important rooms are of American quartered oak; elsewhere, cement covered with rubber tile, or white tile, have been used.

PRINCIPAL ENTRANCE Approaching the building toward its main entrance, one's attention is arrested by the beautiful colonnaded portico and the sculptured pediment above it. One pauses to admire the carved marble group, by Robert Aitken, representing "Liberty Enthroned" guarded by "Order" on her right, scanning the future ready to detect any menace to liberty, and "Authority" on her left, in watchful restraint, yet ready to enforce—if necessary—the dictates of justice. To right and left are figures representing "Council" and "Research — Past and Present."

One is here reminded that the corresponding pediment on the east front is also enriched by sculptural groups. These are by Herman A. MacNeil. The central figures represent Moses, Confucius, and Solon, as lawgivers of the past, with flanking symbolic groups embodying the artist's conception of "Means of Enforcing the Law," "Tempering Justice with Mercy," "Carrying on of Civilization," "Settlement of Disputes between States." "Maritime and other functions of the Supreme Court in the protection of the United States," "Pondering of Judgment," "Tribute to this Court," and "Fable of the Tortoise and the Hare" are shown in the secondary groups. The architrave bears the words: "Justice, the Guardian of Liberty."

Flagstones of subdued and slightly contrasting color, laid in a simple geometrical design, make an attractive approach to the few steps which rise to the terrace level. These steps are flanked by marble candelabra of impressive size and beauty. Carved panels forming their square bases depict on the front face, Justice, holding sword

and scales, and on the other panels, the three Fates, respectively spinning, measuring and cutting the thread of life.

Before beginning the ascent of the broad marble stairway leading to the main entrance, other sculptured marble meets the eye. On the north and south buttresses rest, respectively, two groups by James Earle Fraser. They consist of a male figure as "Guardian," or "Authority of Law," and a female figure of appealing beauty in "Contemplation of Justice."

The works of these eminent sculptors not only add to the esthetic success of the building but will be prized examples of American art and talent.

Even the bronze flagpole bases on the front marble plaza are modeled in symbolic designs, such as the scales and sword representing strength of justice; the book, learning; the mask and torch, light removing the mask of untruth; and the pen and mace, legislation. The beautifully executed little discs above the sway depict the four elements: air, by the eagle's head; earth, by the lion's head; fire, by the tripod of flame; and water, by the fish's head. These flagpole bases were personally designed by Mr. Gilbert, with most of the actual modelling the work of John Donnelly, Jr.

With an appreciation of the beauty and dignity of this work we mount easy steps, pass between huge marble columns and reach the doorway. The doors are sliding leaves of bronze, each weighing six and one-half tons, and each divided into four panels, depicting the following historic events of outstanding significance in the origin and development of the law and its administration and the achievement of equality under it:

1. The Shield of Achilles, representing the origin of law and custom.
2. The Praetor publishing his Edict, signifying the importance of the Judge's work.
3. Julian and a pupil, representing the development of law by scholar and advocate.
4. Justinian publishing the Corpus Juris.
5. King John signing the Magna Charta, confirming legal rights of the people.
6. The Chancellor publishing the first Statute of Westminister in the presence of King Edward I., one of the greatest legal reforms in our history.

7. Coke barring King James I from sitting as a Judge in the King's Court, thereby declaring the court independent of the executive.
8. Chief Justice Marshall and Mr. Justice Story.

These panels are in high relief and are the work of John Donnelly, Jr., of New York City.

Upon entering the building one is immediately conscious of a continuing impression of marble everywhere; softly gleaming, creamy white marble, carefully selected for tint and veining at the quarries. Marble steps, inside the entrance hall, lead one to the main corridor, or memorial hall, built in monumental proportions. The walls of Alabama marble are shadowed on either side by double rows of marble columns, which rise toward a richly colored coffered ceiling with rosettes—an harmonious crown for the monolithic shafts of polished stone. This ceiling was decorated by Paris and Wiley.

THE COURT ROOM AND MAIN FLOOR

The Supreme Court Room, around which the rest of the building is centered and where the highest tribunal of the land sits to dispense, in the words of the inscription carved below the west pediment, "Equal Justice under Law," measures 82 feet by 91 feet from wall to wall and is 44 feet in height. The floor area is about 60 per cent larger than that of the former Supreme Court Room. This dignified chamber, considered one of the most magnificent rooms in Washington, has twenty-four columns of beautifully tinted Old Convent Siena marble brought from the Province of Liguaria, Italy. The walls are finished in Ivory Vein marble from a quarry at Monovar in the Province of Alicante, Spain. Above the columns on the four sides of the room are panels carved in marble by Adolph A. Weinman, following a suggestive pencil sketch made by Mr. Gilbert.

On the East Wall are depicted: "Majesty of the Law" and "Power of Government" with "Genii of Wisdom and Statecraft," "Safeguard of the Rights of the People," and "The Defense of Human Rights."

On the West Wall: "Justice" with winged figure of "Divine Inspiration," flanked by "Truth" and "Wisdom." On the right are "Powers of Evil," "Corruption and Slander," "Deceit and Despotic Power;" on the left, groups symbolizing "Powers of Good," "Defense of Virtue," "Charity," "Peace," "Harmony," and "Security."

On the South Wall: Procession of historical lawgivers, representing Menes, Hammurabi, Moses, Solomon, Lycurgus, Solon, Draco, Confucius, and Octavian, this group being flanked at the ends by "History" and "Fame."

On the North Wall: Procession of historical lawgivers, representing Justinian, Mohammed, Charlemagne, King John, St. Louis, Hugo Grotius, Blackstone, Marshall, and Napoleon, while at the ends "Philosophy" and "Liberty and Peace," respectively, complete the panel.

This sculpture not only adds to the interest and beauty of the room, but like the groups already described, is a signal contribution to the art of this country as well.

Reverting for a moment to the practical appointments of the chamber, it is noted that this room alone of all in the building is completely trimmed and furnished with mahogany. The Bench, always the centre of attraction when the Court is in Session; the desks of the Clerk and Marshal, respectively, at each end but a little below the level of the Bench; seats for spectators, and the furniture within the space reserved for the Bar and the Press, all harmonize perfectly with the rich dark red velour hangings and the sienna tints of the Italian marble columns. The floor covering continues this color scheme, which adds the necessary warmth to complete the impressive beauty of this room.

With the purpose of keeping distracting noise and movement at a minimum, a quiet, pneumatic tube system was also installed in the Court Room. This permits the unobtrusive dispatch of messages to many distant points in the building. Offices of the Clerk, Marshal and Librarian are quickly and silently contacted, while members of the Press are afforded an easy and rapid access to telephones and so to their press associations or newspapers.

The Court Room is flanked by two charming corridors which open upon courtyards through glazed bronze doors. Polished bronze grilled gates separate the Court Room from these corridors and afford easy and unobstrusive entrance on either side.

The easterly section of the building, on the main floor and convenient to the Supreme Court Room, is assigned to the suites of the Chief Justice and the Associate Justices; their Conference and Robing Room; two larger and more ornate Conference or Committee Rooms, and the

Marshal's Offices. A Justice's suite comprises three rooms: one, his private office of modest size, panelled in oak but without other decorations; a room for his law clerk; and the third, for his records.

The two large Conference Rooms are of rich beauty. Pilastered and panelled in oak with hand carved capitals, each room is lighted by two specially designed crystal chandeliers and by natural light from large bronze framed windows opening on attractive courtyards. The ceilings were decorated by two New York firms, one, by Mack, Jenny and Tyler; the other, by Angelo Magnanti. The Conference Rooms are not intended for direct use by the Court, but in general for committees or individuals which it may appoint to perform functions growing out of its work. A committee named for some purpose by the Court; a hearing in chambers; a meeting called by a special master; a Justice sitting as umpire; for any of these or similar purposes the rooms are appropriately assigned.

The westerly section, on the main floor, is assigned to the Clerk of the Supreme Court, the Attorney General, assembly room for the Bar, and public rest rooms.

These rooms and suites on the first floor are approached by a convenient, well-lighted corridor system, connecting all parts by direct, straight passages. The plan is so arranged that any Justice may pass from his own chambers to those of the other Justices for consultation, or to the Court Room, the Conference Room, or the Justices' Library, without passing through the public corridors.

SECOND FLOOR The second floor contains a Reading Room and Library for the Justices, and in addition, Librarian's Offices, Dining Room for the Court, the Reporter's Offices, reading rooms for the use of members of the Bar or for others entitled to special consideration, and a stack room to shelve a complete set of bound Records and Briefs in all cases filed with the Court from 1832 to date.

THIRD FLOOR THE LIBRARY The third floor is devoted to the library and includes two reading rooms of distinction. The first and smaller one is suggestive of a room in some old English castle. Round arches are its dominant motive, arched doorways giving entrance from the narrow corridors or alcoves at either end of the room. Square windows set in arched

recesses and fumed oak pilastered and panelled walls form an unbroken line with the arched ceiling. This ceiling finished in soft colors and decorated in gold with objects typifying knowledge and more particularly as it concerns the law and government, was the work of Mack, Jenney and Tyler.

Apart from its magnificence there is something awe inspiring about the grouped spaces which make up the main library. Its very plan gives one the feeling that he is entering an old cathedral. Voices seem involuntarily hushed, as a few steps from the entrance bring one to a view of the entire plan and permit an appreciation of its impressiveness. Modified to meet a secular need, one sees the nave with aisle on either side, separated by round arches. A transept formed by three adjacent spaces, the central one joining the nave through an arched opening and connecting in turn with an alcove beyond suggestive of the choir, completes the plan and emphasizes its obvious inspiration. In contrast to the Court Room, marble finds no place in this suite, oak being everywhere in evidence. Panelled, pilastered, exquisitely hand carved oak in a design which includes may life sized figures is the predominant feature of this reading room. The wood carving here and in fact throughout the building is the work of Matthews Brothers of Milwaukee. The ornamental plaster ceiling designed and decorated in subdued color and gold by Ezra Winter makes a strong artistic appeal and is another outstanding feature. The admirable modelling for this ceiling is but one of the many examples in the building of the skill of John Donnelly.

Mention has been made of some of the more monumental and impressive works displayed in the decoration of the exterior of the building and in the panels of the Court Room. But there are many other carvings in the building, in both wood and stone, generally taking the form of profiles in cameo executed with a high degree of excellence. Ancient lawgivers and jurists are principally represented and, although an extended reference to the particular act or service dictating their selection must be looked for elsewhere, it seems fitting that their names at least should be mentioned here.

In the bar reading room and foyer are woodcarvings of twelve ancient jurists and lawgivers. Two of these, Draco and Solon, were Athenians who flourished some six centuries B. C. The former appeased the discontent of the

people of Athens by codifying their previously unwritten laws, although without relaxing any of their severity. Most of these laws were repealed some thirty years later by Solon, when he gave the Athenians a new and more democratic constitution, together with certain guaranties of their liberties.

The other ten are Romans, beginning with Capito and Labeo, first teachers of law in systematic form and founders of two schools early in the first century A. D.; Sabinus and Proculus, their pupils, after whom their respective schools were called Sabinian and Proculian; continuing with Pomponius, one of the last members of the Sabinian school prior to its disappearance at the end of the second century. Others are Papinian, greatest of Roman jurists; Paul, most prolific; Ulpian, most industrious and influential; Modestinus, last to succeed to eminence, all of the third century; and, finally, Justinian, emperor whose codification of the laws in 533 A. D. brought together into a unified and coherent body of doctrine the writings of them all.

The frieze on the outside of the building bears eight medallions, two at each corner, also of men of antiquity associated with the growth of the law. These fall naturally into four pairs—philosophers, lawgivers, jurists, and advocates—one pair on each side of the building.

On the south are medallions of Aristotle and Plato, ancient Greeks who formulated the earliest philosophies of government of which we have knowledge. On the west side, appropriately facing the Capitol, are Moses, lawgiver of the Hebrews, and Hammurabi, who promulgated more than 2000 years B. C. the earliest written code that has been found, for the guidance of courts and officials throughout his vast Babylonian empire.

On the north side of the building are plaques of Gaius, Roman jurist famed for his clarity of expression, and who marked the end of opposition between the Sabinian and Proculian schools in the second century A. D., and Julian, who revised and arranged the Edicts of the praetors by order of the emperor Hadrian in 131 A. D. The east wall bears profiles of Cicero, the greatest advocate ever called to the Roman bar, to whose orations and writings we owe most of our knowledge of Roman law under the republic, and Demosthenes, Athenian, unsurpassed in oratory and author of the famous "Philippics" against Philip of Macedon.

Other medallions decorate the frieze of the memorial hall. They include profiles of the Roman goddess Juno, the Greek god Zeus, and legislators Solon and Moses. These likenesses are repeated many times around the frieze, alternating with various symbolic carvings, including armor, the helmet, the open book with torches, the scale and the lamp, the lion's head flanked by fasces, the owl, and the eagle.

OTHER FLOORS AND SPECIAL FEATURES

The ground floor is placed at the general level of the terrace. It contains filing, stack, and storage rooms for the Marshal and Clerk, a cafeteria and kitchen, rooms for messengers, pages, women employees, the guard force, the mechanical staff, telephone and telegraph, the press, and ladies' waiting and rest rooms. There are entrances from the terrace to this floor on all sides of the building.

From the street, the basement is entered by inclined driveways located adjacent to the north and south terraces and leading from Second Street East. The Justices or other officials of the Court may enter or leave by this way, and reach or leave their offices by elevators or stairs. Adequate space for garages is available in the basement. Here also is located the machinery necessary for the lighting and air conditioning of the building.

A tunnel, amply large for pedestrian traffic, opens from this level and, running well below the level of the adjoining street, connects with the basement of the Library of Congress. It affords a direct and protected route between the buildings for employees of the Supreme Court Library who must make frequent trips to the larger library for wanted volumes. This tunnel also carries the pneumatic message tube in operation between the two libraries.

The building is fireproof throughout and is of the best type of modern construction. The heating, ventilating, air-conditioning, plumbing, and electric systems are installed in accordance with the best practice. Modern elevators and ample stairways provide convenient and quick communication between the different floors.

In each of the four quarters of the building is a courtyard, 64 feet square, ornamented by a fountain in the center. These courtyards afford light and outside exposure to rooms not opening on the street, as well as being interesting and attractive.

Any description of the building which omitted special mention of the stairways would fall short of completeness. The two elliptical spirals, one on either side of the center of the building, are features of outstanding interest. Ascending from the basement to the third floor, a distance of five stories, these fascinating structures of marble and bronze both artistically and architecturally challenge the admiration of engineer, architect, and layman. The broad steps, though appearing without adequate support, are keyed together by overlapping and are in part balanced by their extension well into the marble lining of the stairwells.

Two other broad stairways, which begin their ascent on either side of the main corridor close to the entrance, attract by their chaste simplicity. They are best seen from the first floor where ascending vision is arrested by a glimpse of marble balustrade and a crowning bit of cerulean blue ceiling on which figures of gold have been laid.

Chief Justice Taft's often voiced desire that the Supreme Court Building express the idea of permanence as well as practical and esthetic requirements has been exemplified in the plans of the architect and the work of the builder. Although the entire completed structure reflects this underlying thought, the effort to achieve a high degree of indestructibility is shown nowhere more decidedly than in the construction of the roof. Here was first laid a slab of watertight concrete. Over this a roof of heavy grade, lead coated copper was imposed. Then, to combine assurance triply sure with harmonious coloring and design, heavy, heat-resistant Roman tiles of creamy tint were placed on bronze strips in such a way as to leave an intervening air space of several inches.

Now a word about the cost of the building. Based on estimates procured by the Building Commission and submitted to Congress with the plans, in conformity with the Act by which it was created, an appropriation of $9,740,000 was authorized. Because of a satisfactory low bid and of economies effected during the progress of the work, not only was the final and complete cost of the building brought within the total appropriation, but the procurement of all furnishings as well, a big item not within the contemplation of the Act, was made possible. In addition a considerable balance remained unexpended. This is indeed a record of careful spending with which all connected with the construction of the building may be justly proud.

4-17-52
For Dr. Louis A. Warren
from
John Francis Gough
with Compliments

In The Teeth Of --

By JOHN FRANCIS GOUGH,
Officier d'Académie

It seems strange to laymen that the United States Supreme Court occasionally decides suits by a vote of five-to-four. But if we accept Alexander Hamilton and John Marshall's doctrine of powers implied, even against expressed reservations in the Constitution, and if we make allowance for super-fine political circumstances which always control the selection of Supreme Court Justices, no reasoning man should be surprised that in disputes arising under the Constitution nine judges, theoretically all well trained in their profession, are, a few times in each generation unable to agree upon what is the law of this land of dual sovereignties. Who will explain different renditions of the same music by artists called *virtuosi?*

It might well be supposed, however, that generation after generation upon a mere matter of business morality, scholars and gentlemen, members of a high court, would agree; and yet their not infrequent differences of opinion as to what principle of law should control a business matter continues to puzzle even enlightened minds. An instance which gave pause in 1935 to many not concerned in the slightest with constitutional questions, was the five-to-four decision in the Furlaud case; it dealt with the responsibility of corporate promoters who gather exceedingly large profits.

The United States Court for the Southern District of New York regarded as excessive and fraudulent an appraisal of assets, made for such promoters. The District Court declared that the circulars issued by these entrepreneurs grossly and fraudulently misrepresented the value of property which was to stand as security for the payment of contemplated bonds and notes, and (the court continued) the proceeds of subscriptions were consequently trust moneys for which these promoters should account. Accordingly the District Court gave judgment against them and their corporations for $2,000,000., but refused to grant an additional sum sought for another fraud in the issuance of stock. Upon cross-appeals to the Circuit Court of Appeals of the United States for the Second Circuit, that Court declined to examine the merits of the respective appeals; it dismissed the complaint of the receiver of the then defunct corporation upon the collateral ground that his appointment had been void for a want of jurisdiction. This ruling the United States Supreme Court reviewed and reversed, and (Justice Brandeis speaking) it remanded the cause for determination upon the merits. The promoters then unsuccessfully moved the Supreme Court to re-hear the appeal. So the parties returned to the Circuit Court of Appeals; there the defendant promoters were again victorious. The final view of the Circuit Court was since the promoters and their dummies were all and the only shareholders in the corporation at the time of the criticised transactions, that therefore the corporation, its new shareholders, and its receiver, were bound by the knowledge and consent of everybody originally interested in the exchange of property for stock. The Circuit Court said that under the doctrine of *Old Dominion Copper and Mining Co. v. Lewisohn,* nobody had been legally defrauded. Then followed a second appeal: this time it was based upon the merits of the controversy, and, the Supreme Court, by five-to-four, held the promoters and their tools liable to the receiver of the wrecked corporation. It accordingly reversed the decree of the Circuit Court; and it also modified the original decree of the District Court by increasing the recovery against one set of defendant promoters in the sum of $425,000. with interest for five years. On the other hand it permitted (for disbursements upon organization) a comparatively slight deduction in favor of one set of defendants.

Said (1) Justice Cardozo, supported by (2) Chief Justice Hughes, and (3) Justices Vandervanter, (4) Brandeis, and (5) Stone:

"As promoters of a corporation stand in a fiduciary relation to it, *** they will be chargeable to it as trustees."

But (1) Justice Roberts, dissenting, said:

"These promoters took an unconscionable profit, reaped at the expense of a credulous and avid purchasing public, but this ought not indnce the Courts to disregard settled principles in an effort to deprive the respondents of the fruits of their scheme." Justices (2) McReynolds, (3) Sutherland and (4) Butler agreed with Justice Roberts.

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Thus, by the closest vote the United States Supreme Court, in November 1935, in McCandless v. Furlaud, decreed for the present generation that unconscionable promoters must do more than observe legal formulas.

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Keen observers will notice that although this decision of the justices was concerned with private rights, there was involved an important question of public concern. They will remark, too, that with the then so-called *liberals* of the Court was aligned Justice Vandervanter, usually found with what was regarded as the conservative element of the Court. But Justice Roberts, often voting with the liberal element, here led the *conservatives*. So the case demonstrated anew that labels often deceive.

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Shall one attempt to reconcile the Justices' divergences of opinion? It seems futile. Justice Cardozo, born and bred in New York (he studied in the shadows of Wall Street) said:

"Old Dominion Copper Mining and Smelting Co. v. Lewisohn, a case determined by the Supreme Court in 1908, does not rule the case at hand, *** and several considerations, without more, would separate the *Old Dominion Copper Mining and Smelting Company* case from the one before us now. *** Other aspects of the present case accentuate the division. What was done by the promoters here is IN THE TEETH OF a prohibition of the Constitution of Pennsylvania."

But Justice Roberts, a Pennsylvanian (in the Tea-Pot Dome litigation he rendered priceless service for honesty and for the Republic) wrote:

"This Court reverses the holding (that the promoters were not liable) and makes them liable to account for all they received for the stock. This is IN THE TEETH OF *Old Dominion Copper Mining and Smelting Co. v. Lewisohn*. *** This Court speaking by Mr. Justice Holmes held (there) that any wrong done innocent subscribers could not be redressed in an action by the corporation *** (Here) were no innocent subscribers. *** The Courts with practical unanimity held the corporation has no right of action. *** On its face the transaction amounted to (only) that nothing more: The promoters paid themselves an exorbitant price in notes, bonds, stock and cash for the property which they turned over to the corporation they had promoted. *** They are now converted into trustees for a corporation, which corporation they were in essence at the time of the transaction, and which, therefore, had full and complete knowledge of every factor in transaction. This again is IN THE TEETH OF *Old Dominion Copper Mining and Smelting Co. v. Lewisohn*. *** The facts just stated clearly indicated that the decision now made in effect *overruler* the old Dominion case *** *Nothing* is disclosed in the (majority) opinion of the Court to differentiate this case from the Old Dominion case save that, as asserted *last and found below*, the transaction here caused insolvency to the corporation. *** The Constitution of Pennsylvania is not self-executing and the Supreme Court of that Commonwealth has already indicated that such a bill under the circumstances of this case will not lie."

* * * * *

These opinions are IN THE TEETH OF each other.

* * * * *

The chief points of the prevailing Furlaud opinion of 1935 are: (a) corporate promoters stand in a fiduciary relation to their corporation to the extent that they will be chargeable as trustees, if they deal with the corporation unconscionably, or oppressively, or in violation of statute, unless liability for such misconduct has been effectually released; and (b) yet the law laid down by the Supreme Court of the United States in *Old Dominion v. Lewisohn*, to the contrary effect, in 1908, is still the law of the land (believe it or not).

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There is nothing in the prevailing opinion that expressly criticises this earlier decision. But, this is the second time since 1908 that the Supreme Court has subtly, yet actually, declined to follow the law established by it in the Lewisohn case.

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It helps to look at the Lewisohn record. *****

In 1895 Alfred S. Bigelow, of Boston, and Frederick Lewisohn of New York, men of affairs, *arcades ambo*, organized the Old Dominion Copper Mining and Smelting Company. It startlingly resulted that although this company, for thirteen years, regularly sent actually earned dividends to its stockholders, the Supreme Judicial Court of Massachusetts, in 1908 decreed that Bigelow should pay the Old Dominion Copper Mining and Smelting Company the sum of $2,178,673.33, secret profits (with the interest thereon), realized in 1895 by him and Lewisohn, as company promoters. But at the same time, after having given careful attention to a well developed argument for the Old Dominion Company, earnestly delivered by a leader of the Bar, then in his stride of national fame, the United States District Court in New York decided that upon the same account as that filed in Massachusetts against Bigelow, substantial justice would not be advanced but rather a great injustice would be done, if the corporation were allowed to recover one cent from Lewisohn. That, too, was the conclusion of the late Justice Holmes, who spoke for a unanimous Supreme Court, which upon the Old Dominion Company's appeal affirmed the decree exonerating Lewisohn. Holmes thought that *from a business aspect alone, it was immaterial to the company whether or not there was a subordinate fraud by Bigelow and Lewisohn against fellows in the syndicate who had thought they were truly in upon the ground floor.* *** So Lewisohn went scot free, legally, but Bigelow was ditched. Of course, it may well be imagined that like every other human, Lewisohn observed the rule of *Noblesse oblige*, and helped his fellow out of a legal pit-fall neither had intended to dig.

In Massachusetts, the suit against Bigelow had been bitterly contested by ancient well-seasoned leaders of that Commonwealth, but the brilliant vigorous advocate for the Old Dominion Company (then in the very fine glow of his talent and also of national fame) persuaded the Massachusetts courts to adopt the enlightened rule that regards promoters as trustees.

* * * * *

Bigelow incidentally resorted to the Court of Chancery of New Jersey for a ruling that the Old Dominion Company, a corporation of that state, was acting contrary to equity and good conscience in prosecuting him in Massachusetts and should be restrained, because, for one reason, the public policy of New Jersey stamped such a suit as a speculation which savored of champerty and maintenance (unlawful support of litigation). He therefore prayed to be excused from returning the enormous profits garnered by him and Lewisohn.

* * * * *

Bigelow's suit in New Jersey was begun in the early Spring of 1908, just as the coils were tightening about him in Massachusetts, and almost at the very moment that Lewisohn received the legal accolade of the Supreme Court at the hand of the Massachusetts-bred Justice Holmes, a legal philosopher whose ear had then hardly been grazed by the inevitable approaching host who faintly whispers "Come along."

In the New Jersey Court, Bigelow had short shift. His first step there was to apply to a vice-chancellor to restrain the Old Dominion Company from further proceeding in Massachusetts. His three chief counsel were Bennet Van Syckle, an ancient former justice of the Supreme Court of New Jersey, John Griffin, a well-rounded practitioner, who later filled the office of Vice-Chancellor, honestly, with dignity, and unsuspicously, and new Massachusetts talent in the person of a lawyer who was descended from the brother of a middle nineteenth century President of the United States. Initially (not then unusual) a short restraint was granted against the Old Dominion Company. Its brilliant vigorous Massachusetts advocate surrounded himself, for his side, with New Jersey counsel who were easily among chiefs in that jurisdiction. Though these argued well and strenuously, the adjudicating Vice-chancellor decreed it would harm nobody, were he to restrain the proceedings in Massachusetts until it was judicially settled in New Jersey whether there had been an attempt to violate the public policy of that State. But this adjudication did not affect the Old Dominion's privilege ever so slightly. Under Chancery rule they were enabled, upon giving notice of a motion to dismiss Bigelow's complaint, to draw the judgment of the Chancellor himself, then Mahlon Pitney, who some years later became a Justice of the Supreme Court of the United States. Of a royal legal family long active in pious Republican circles in New Jersey he must have been amused if not surprised, when before him there finally appeared with Bigelow's counsel a new foreign advocate. This new man-at-law was none other but his old party associate in Congress, John C. Spooner, a wheel-horse for Mark Hanna and big business in the early twentieth century United States Senate, who had, in the view of the rising La Follette tide, quit Wisconsin for a lucrative law practice in New York and vicinity. Spooner and his associates at great length opposed the dismissal of Bigelow's bill of complaint, but the lawyers for the Old Dominion Company successfully convinced Chancellor Pitney (he should not be confused with his father who was Vice-chancellor) that there was no equity in the complaint of Bigelow, the Massachusetts litigation had already settled all issues, and this so long ago that Bigelow was *in laches*; so ran their contentions. During the argument, the Chancellor said he had the advantage of consulting the Vice-chancellor who initially had erroneously imagined that the whole case might be examined upon at least one meritorious phase.

* * * * *

Chancellor Pitney's opinion (he dismissed Bigelow's complaint) was perhaps the longest he ever wrote; and it may have been a slight factor in his appointment to the Supreme Court of the United States. There he arrived on March 13, 1912, just a week after Bigelow's appeal from the Massachusetts judgment was there argued.

* * * * *

For Bigelow and his Massachusetts counsel had returned to their habitat to wince under a judgment of more than two million because the Massachusetts courts after a final inspection of *pros* and *cons* thought it of no avail to Bigelow that the Supreme Court of the United States, (even with that Massachusetts Brahmin, Justice Holmes, speaking) had decided in *Old Dominion Company v. Lewisohn* that Bigelow's partner on the same score owned not a cent to the Old Dominion Company.

* * * * *

So in the first week of March 1912, Owen D. Young, then a jurisconsult of Boston, with Spooner and six other men-at-law urged the United States Court that since it had given a clean bill of health to Lewisohn in his case, it should now absolve Bigelow. But the Court unanimously shook its collective head, and had Justice Lurton say:

"The conclusion we reach is that the Massachusetts Court (in denying Bigelow's plea that since Lewisohn, his privy, had been held not guilty by the United States Supreme Court, Bigelow, too, should go scotfree) did not deny full faith and credit to the Lewisohn judgment." It was made clear, however, in a very proper judicial aside that Justice Hughes (whose appointment by President Taft in 1910 seemingly cleared Taft's way to a renomination to the presidency) had taken no part in the hearing or consideration of Bigelow's appeal.

* * * * *

It seems, however, that a few months earlier the Supreme Court of the United States, in the case of Norman W. Davis and Charles H. Phillips, appellants, against Lea Ovss Company, respondent, had unanimously held that *Old Dominion v. Lewisohn* had no application, and that subordinate fraud in that earlier case had been a matter solely between the members of the promoting syndicate, which gave rise to no right of corporation action; but in the instant case, the promoters, Davis and Phillips, *by failing to disclose the truth to their associates in the promotion syndicate and to deal openly with them, had practiced a fraud in the promoters' arrangement, and such a fraud became operative against the corporation*

fully. They were accordingly directed to return their gains (as promoter-trustees) to their company. Justices Holmes, Pitney and Hughes coincided with this particular view.

A younger lawyer whose ear is already old enough to feel itself brushed now and again by mysterious fingers and also hear a slight murmurous "Come Along", may praise the decision in the Las Ovas Case, and yet be unable to see how the controversy there differed in essence from the Lewisohn controversy, for in both cases subordinate fraud was a fact. Evidently, however, the great dissenter of the Court could already see a distinction for there came from him no dissenting opinion in the Las Ovas case. It may well be supposed that his younger fellows, Hughes and Pitney, thought that his old age should be honored for its toil.

• • • • •

The average conservative lawyer will probably say that Justice Roberts was quite justified in concluding that the Lewisohn case and the Furlaud case are pig-cases, i.e., upon all fours. But it looks as if the clock may not be turned back, and, regardless of fine spun decisions, it is no doubt well for the coming generation that even the avid and credulous stock purchasing public be protected against the wickedness and snares of the more avid and more credulous (they have thought to get away with everything) promoting clans if they spring up again, and act in defiance of the Securities Exchange Commission.

• • • • •

Under no rule of sane business should courts be asked to sanction the bewildering and be-devilling entanglements (masterfully stated and resolved by Mr. Justice Cardozo) which permitted the promoters in the Furlaud case to pocket spoils estimated ("a manifest realty") at three million dollars. For, as Justice Roberts coolly and candidly observed "the promoters ** took an unconscionable profit," and as Justice Cardozo cried out: "In fact, about three fifths of the money (invested by the public) was applied to the designated uses (business purposes), the rest being kept by the promoters. If this could be done without cutting down the value of the assets below the mortgage debt, the act would be so near magic, as to call for explanation from promoters not professing to be magicians."

• • • • •

The law, all lawyers, and all judges should, of course, speak a clear language lest the layman charge, as Jerome Frank has indicated, that the administrators of Justice are professional rationalizers and hypocrites or worse. No fetich can now preserve the Lewisohn case as law. It has been repudiated in fact and effect.

• • • • •

Simple Justice should add: (1) the brilliant vigorous Massachusetts advocate who successfully prosecuted the Old Dominion Company's claim and persuaded the Massachusetts Court to direct Bigelow to pay back, and this in the face of the decision of the United States Supreme Court exonerating Lewisohn, was Louis D. Brandeis; the same Justice should add (2) the leader of the American Bar, already across the threshold of national fame, who sought unsuccessfully to fasten the coils around Lewisohn in the Federal Court of first instance, was Charles E. Hughes. He and Brandeis, in the 1900's were correspondents; later they used to participate now and again with more or less effect in five-to-four decisions in the Supreme Court of the United States, as in the Furlaud case in 1935, a rather striking example of poetic justice, as it must have appeared to them, for it was *In The Teeth Of* the Lewisohn decision.

• • • • •

One wonders, however, if in a later generation of Supreme Court Justices five out of nine will think *Old Dominion v. Lewisohn* still the ruling case for the free enterprise of corporate promoters.

• • • • •

THE CASES

1907: *Old Dominion, etc. v. Bigelow* 188 *Mass.* 315, 74 *N. E.* 653.
1908: *Old Dominion, etc. v. Lewisohn* 210 *U. S.* 206, 28 *S. Ct.* 634.
1908: *Bigelow v. Old Dominion, etc.* 74 *N. J. Eq.* 457, 71 *Atl.* 153.
1909: *Old Dominion, etc. v. Bigelow* 203 *Mass.* 159, 89 *N. E.* 193.
1912: *Bigelow v. Old Dominion, etc.* 225 *U. S.* 111, 32 *S. Ct.* 641.
1913: *Davis v. Las Ovas Co.* 227 *U. S.* 80, 33 *S. Ct.* 197.
1935: *McCandless v. Furland* 296 *U. S.* 140, 56 *S. Ct.* 41.

JOHN FRANCIS GOUGH
2672 BOULEVARD
APT. 402
JERSEY CITY 6, N. J.

4-17-52
For Dr. Louis A. Warren
from
John Francis Gough
with bestwishes

In The Teeth Of --

By John Francis Gough,
Officier d'Académie

It seems strange to laymen that the United States Supreme Court occasionally decides suits by a vote of five-to-four. But if we accept Alexander Hamilton and John Marshall's doctrine of powers implied, even against expressed reservations in the Constitution, and if we make allowance for super-fine political circumstances which always control the selection of Supreme Court Justices, no reasoning man should be surprised that in disputes arising under the Constitution nine judges, theoretically all well trained in their profession, are, a few times in each generation unable to agree upon what is the law of this land of dual sovereignties. Who will explain different renditions of the same music by artists called *virtuosi?*

It might well be supposed, however, that generation after generation upon a mere matter of business morality, scholars and gentlemen, members of a high court, would agree; and yet their not infrequent differences of opinion as to what principle of law should control a business matter continues to puzzle even enlightened minds. An instance which gave pause in 1935 to many not concerned in the slightest with constitutional questions, was the five-to-four decision in the Furlaud case; it dealt with the responsibility of corporate promoters who gather exceedingly large profits.

The United States Court for the Southern District of New York regarded as excessive and fraudulent an appraisal of assets, made for such promoters. The District Court declared that the circulars issued by these entrepreneurs grossly and fraudulently misrepresented the value of property which was to stand as security for the payment of contemplated bonds and notes, and (the court continued) the proceeds of subscriptions were consequently trust moneys for which these promoters should account. Accordingly the District Court gave judgment against them and their corporations for $2,000,000., but refused to grant an additional sum sought for another fraud in the issuance of stock. Upon cross-appeals to the Circuit Court of Appeals of the United States for the Second Circuit, that Court declined to examine the merits of the respective appeals; it dismissed the complaint of the receiver of the then defunct corporation upon the collateral ground that his appointment had been void for a want of jurisdiction. This ruling the United States Supreme Court reviewed and reversed, and (Justice Brandeis speaking) it remanded the cause for determination upon the merits. The promoters then unsuccessfully moved the Supreme Court to re-hear the appeal. So the parties returned to the Circuit Court of Appeals; there the defendant promoters were again victorious. The final view of the Circuit Court was since the promoters and their dummies were all and the only shareholders in the corporation at the time of the criticised transactions, that therefore the corporation, its new shareholders, and its receiver, were bound by the knowledge and consent of everybody originally interested in the exchange of property for stock. The Circuit Court said that under the doctrine of *Old Dominion Copper and Mining Co. v. Lewisohn*, nobody had been legally defrauded. Then followed a second appeal: this time it was based upon the merits of the controversy, and, the Supreme Court, by five-to-four, held the promoters and their tools liable to the receiver of the wrecked corporation. It accordingly reversed the decree of the Circuit Court; and it also modified the original decree of the District Court by increasing the recovery against one set of defendant promoters in the sum of $425,000. with interest for five years. On the other hand it permitted (for disbursements upon organization) a comparatively slight deduction in favor of one set of defendants.

Said (1) Justice Cardozo, supported by (2) Chief Justice Hughes, and (3) Justices Vandervanter, (4) Brandeis, and (5) Stone:

Lincoln Lore

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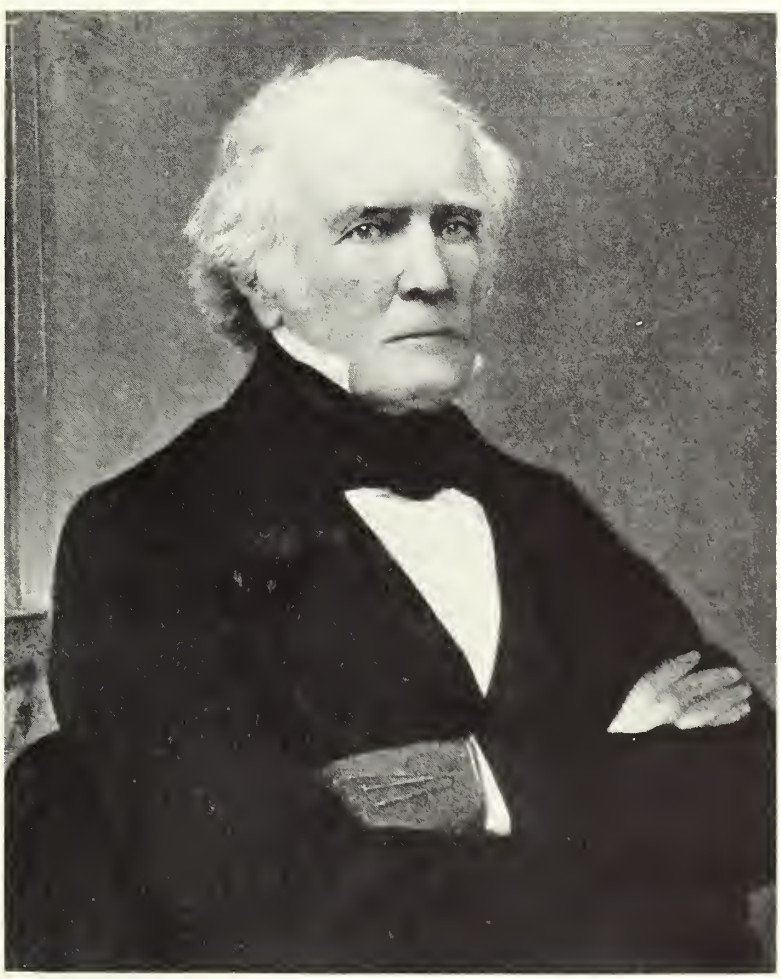
A Philadelphia Lawyer Defends the President

"The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." This one sentence is the sole mention of the writ of *habeas corpus* in the United States Constitution. Before the Civil War, it had figured only rarely and briefly in the country's seventy-odd years of constitutional disputes and controversies. In 1807, President Thomas Jefferson became sufficiently alarmed over the Burr conspiracy to ask Congress to suspend the privilege of the writ for a period of time. Behind closed doors, the Senate passed a bill to suspend for three months, but the House rejected the bill by a large majority. Chief Justice John Marshall, in a case which also stemmed from the arrest of an alleged member of the Burr conspiracy, *Ex parte Bollman,* said "that if at any time the public safety should require the suspension of the power" to issue the writ, "it is for the Legislature to say so. That question depends on political considerations, on which the Legislature are to decide." Finally, one of the great commentators on the United States Constitution, Judge Joseph Story, said rather tentatively, "It would seem, as the power is given to *Congress* to suspend *the Writ* of Habeas Corpus in case of Rebellion or Invasion, that the right to judge whether the exigency had arisen, must exclusively belong to that body."

There was nothing in the history of the use and interpretation of the *habeas corpus* clause in the Constitution to prepare the country for President Abraham Lincoln's suspension of the privilege of the writ of *habeas corpus,* which occurred as early as April 27, 1861. The issue was brought to public attention by the case of one John Merryman, who lived near Baltimore and was arrested on suspicion of being the officer in charge of a pro-secession Maryland military unit, of being a party to destroying railroad tracks and bridges to prevent loyal troops from reaching Washington, and of obstructing the United States mails. The Chief Justice of the United States Supreme Court, Roger B. Taney, also sat as a circuit judge in the Maryland federal court, and he issued a writ of *habeas corpus.* The military officer who had arrested Merryman refused to present Merryman to the court on the grounds that the President had suspended the privilege of the writ. Taney then wrote an opinion—as a circuit judge, not as the Supreme Court's Chief Justice—which claimed that President Lincoln could not suspend the privilege because Congress, like Parliament in England, alone possessed that power. Lincoln and Attorney General Bates ignored the opinion.



From the Lincoln National Life Foundation

FIGURE 1. This portrait of Horace Binney, copied from a photograph, pictures him as he must have looked about the time he wrote *The Privilege of the Writ of Habeas Corpus under the Constitution.* The portrait appears in Charles Chauncey Binney, *The Life of Horace Binney with Selections from His Letters* (Philadelphia: J.B. Lippincott, 1903).

Most of the authorities in print to that date and the Chief Justice of the Supreme Court thus argued that Lincoln could not do, constitutionally, what he had done. The President badly needed some legal opinion supporting his position. The Attorney General supplied one, but most authorities, then and ever since, agree that it was sloppily done and poorly argued. Joel Parker, Royall Professor of Law in the Harvard Law School, supported the President in an article for the prestigious *North American Review* entitled "Habeas Corpus and Martial Law." Parker, who would become a foe of the President after he issued the Emancipa-

tion Proclamation, argued broadly that in time of "paramount military obligation . . . the military law must be held to supercede the civil." Parker's argument was broader than it needed to be, for suspending the *habeas corpus* privilege subjects the party only to arbitrary arrest and confinement; it does not subject him to martial law and thus to trial by military tribunal rather than by jury in a civil court. President Lincoln was still in need of a persuasive defender who could sift the constitutional authorities and, in a rigorous way, supply a logical constitutional argument for the Executive's power to suspend the writ of *habeas corpus*.

1. A Conservative Admirer of Lincoln

The argument Lincoln needed came from an odd source, a conservative octogenarian lawyer from Philadelphia named Horace Binney, a man who had largely avoided political disputes for some thirty years. The President did not seek him out, but Francis Lieber, a German immigrant who became America's greatest early student of politics and probably her first professional political scientist, did. Lieber, who himself wrote many pamphlets encouraging loyalty during the Civil War, urged Binney to publish a pamphlet on the subject of the *habeas corpus*. Binney was interested in the question because he doubted the validity of the arguments he had seen, because he believed heartily in the Union cause, and because he was an admirer of President Lincoln.

Horace Binney was a rather unlikely Lincoln admirer. Born in 1780, he was a generation older than Lincoln. He attended Harvard College and graduated with high honors in 1797. He studied law with Jared Ingersoll in his home town, Philadelphia, and gained admittance to the Philadelphia bar in 1800. He served one term as a legislator elected on a fusion ticket of Federalists and Independent Democrats. Thereafter his law practice amidst the burgeoning commerce of Philadelphia became very lucrative. He became a director of the first United States Bank. In 1832, he ran successfully for Congress, this time as an anti-Jackson candidate (and with the understanding that he would not have to support Pennsylvania's pet interest, the protective tariff; that a vote for him should be considered only a vote against Andrew Jackson; and that he would not be bound to act with any party in Congress). There he became rather embittered against party politics; "the spirit of party," he said, "is a more deadly foe to free institutions than the spirit of despotism." He retired for the most part from active court work twenty-four years before the Civil War began, and, although he wrote several eulogies and an historical piece on the authorship of Washington's Farewell Address, he was little involved in political questions until the war broke out.

Binney disliked democracy, whether with a small or a large "d," and he opposed the provision of the Pennsylvania Constitution of 1838, which made the tenure of the state's judges a period of years rather than during good behavior. He was a rather crusty Federalist as long as that party existed. He always hated the Democratic party, but he had his reservations about the Whigs as well, especially insofar as their leaders, Henry Clay and Daniel Webster, practiced the political arts to gain the Presidency. Writing, appropriately enough, to Alexander Hamilton's son, J.C. Hamilton, in 1864, Binney accused Clay and Webster of caring "nothing about true fame" and of wanting "only . . . to get on the top of the pillar, like Simeon Stylites, to be looked at with upturned eyes by the people, and to be fanned with the *aura popularis* from all quarters of the heavens." He concluded:

> These aspirations for the President's office are to me a wonder and an astonishment, and I sometimes think that the most decisive argument against a republic is that it fools and dwarfs the best minds in the country, by directing their hearts towards the vain, ephemeral show of the first office in it, to be obtained by popular arts and intrigues; and the saving feature of a monarchy is its permanent, though personally insignificant, head, which compels men of great minds from thinking of the pinnacle, and drives them to work for their own fame in the elevation and consolidation of their country. . . .

Thus Binney was a true old Federalist who never quite adjusted himself to the age of the common man which flowered with Jacksonian democracy. His biographer, Charles Chauncey Binney, noted perceptively that it was Binney's dislike of democracy that made him the enemy of the Democrats without really being the friend of the Whigs.

> Mr. Binney's opposition to the Democratic party was due to its having made democracy its fundamental principle from the start, but he was well aware that after the passing of Federalism, the democratic spirit affected all political parties. Writing about 1840, he said, "The Whigs are at this day more democratic in their devices and principles than the Democrats were in the days of Jefferson. There are few or no sacrifices of constitutional principle that the Whigs will not make to gain power, as readily as the Democrats. . . . they have entered into full partnership with those who trade upon the principle that the people are all in all, that their voice is *vox Dei*, that the masses are always right, and that nothing else is fundamental in government but this. What the Whig affix means, I think it is difficult to say. . . . The only question is how to obtain most of the sweet voices and emoluments of government, and this is as much a Whig object as a Democrat object, and there is no obvious or characteristic difference in the nature of their respective bids."

Binney explained his political philosophy, as opposed to his party principles, to his British friend J.T. Coleridge in 1863, "I have a horror of democracy as the radical principle of a government, . . . while I am as firm a friend of free government as any man that lives." He reconciled the two seemingly divergent beliefs by invoking the age-old idea that representatives were responsible to God, though chosen by the people:

> That the people are the final cause and the Constitutional origin of all power among us is true. . . . But the moral source of all power, which is also the source of the people, has respect to the ends and purposes, the sure establishment of freedom as well as its diffusion, [and] the people as people are not the true source of it, but God above, and the moral qualities with which His grace imbues some and not all men. Virtue, reason, love for mankind, which come from the eternal source of all power, have better right to exercise it than man simply.... His moral qualities are his true title; and therefore, while I admit him to be the final cause of political power with us, I do not admit him to be the efficient cause of power in government.

He recognized equality of opportunity for political distinction but not equality of capacity and therefore required "siftings, distinctions, and qualifications, in all preparations for the exercise of political power. . . ."

Despite the dominant anti-democratic theme in his long life, Binney found much to admire in the railsplitter whose skillful practice of the political arts brought him to the Presidency in 1861. He apparently knew little or nothing about Lincoln before he assumed the office, and he therefore judged the President by his acts. Binney liked what he saw. In March of 1861, he discussed Lincoln's Inaugural Address with Coleridge:

> . . . I hope you will agree with me that it is a plain, sensible paper, expressing right doctrines as to the perpetuity of the Constitution, the unlawfulness of *secession*, and the duty of enforcing the laws; and in a kind temper, tho' with all requi-

FIGURE 2 (facing page 2). Horace Binney's pamphlet appears in the upper left hand corner. Judge S.S. Nicholas of Louisville, J.C. Bullitt* of Philadelphia, George M. Wharton* of Philadelphia (in two pamphlets), Tatlow Jackson,* Edward Ingersoll of Philadelphia, John T. Montgomery* of Philadelphia, C.T. Gross, William M. Kennedy, Isaac Myers,* and James F. Johnson* answered it. Sydney George Fisher's "Suspension of Habeas Corpus During the War of the Rebellion" identifies the author of the pamphlet shown in the lower left-hand corner as David Boyer Brown; previous owners have identified it on the cover as Frank Taylor's pamphlet. Wharton's and Montgomery's answers are also pictured. Asterisks (*) indicate pamphlets in the Lincoln National Life Foundation collection.

THE PRIVILUGE

OF THE

WRIT OF HABEAS CORPUS

UNDER

THE CONSTITUTION.

C. Sherman & Son, Printers Philada.

THE

WRIT OF HABEAS CORPUS,

MR. BINNEY.

SECOND EDITION

PHILADELPHIA
JOHN CAMPBELL, BOOKSELLER,
CHESTNUT STREET
1862.

REPLY TO HORACE BINNEY,

ON

THE PRIVILEGE

OF THE

WRIT OF HABEAS CORPUS

UNDER

THE CONSTITUTION.

BY

A MEMBER OF THE PHILADELPHIA BAR.

PHILADELPHIA:
JAMES CHALLEN & SON, PUBLISHERS
NO. 600 CHESTNUT STREET
FOR SALE BY
ROSS & TOUSEY, NEW YORK. A. WILLIAMS & CO. BOSTON.
H. TAYLOR, BALTIMORE.
1861.

REMARKS

ON

MR. BINNEY'S TREATISE

ON THE

WRIT OF HABEAS CORPUS.

BY

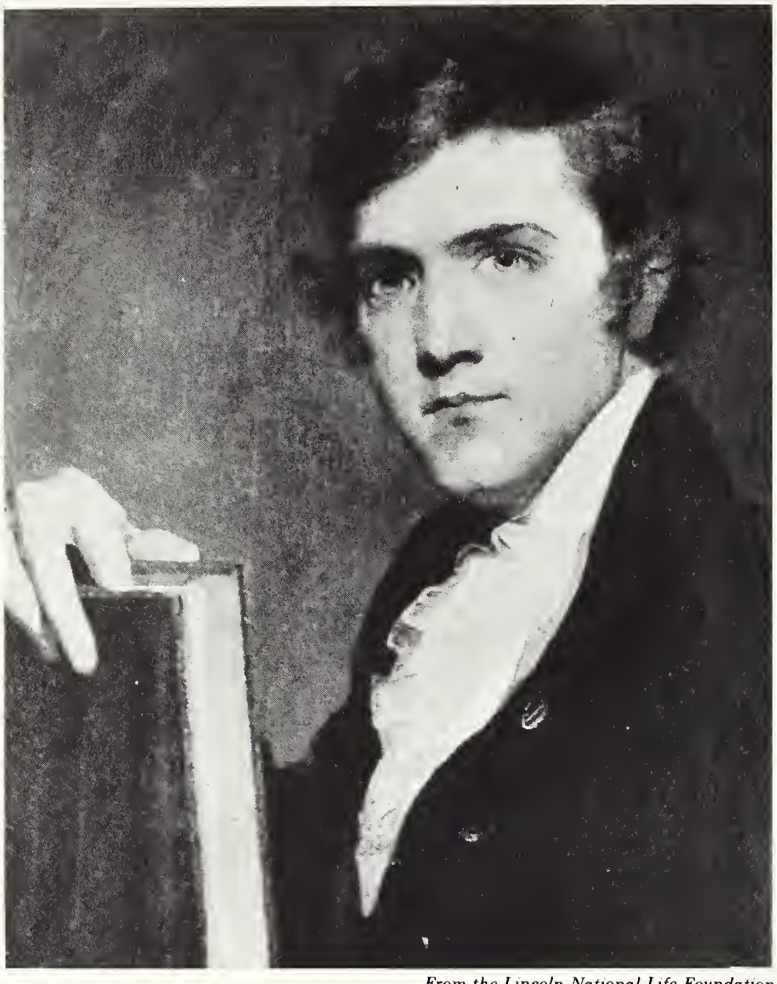
G. M. WHARTON.

SECOND EDITION

PHILADELPHIA
JOHN CAMPBELL, BOOKSELLER
1862

From the Lincoln National Life Foundation

site firmness, declaring his purpose to administer his office with fidelity, and with effect as far as the country shall supply the means. I should think, and this is the common opinion, that the paper has been written by himself; and that it is a proof of a plain, sound mind, free from any disposition to press what he thinks right with much rigour, or what he thinks wrong or plainly expedient, from mere fidelity to party; the best temper, perhaps, for our country. His reasoning upon disputed points, where I have examined it with attention, appears to be accurate, and his heart kind. He is generally regarded as a cordial man, not highly educated, but of good reasoning powers, and both calm and brave. On the whole, I like his début. The *people* will understand him; and that is a great point with us.



From the Lincoln National Life Foundation

FIGURE 3. Proof that Horace Binney's career bridged two widely separated eras lies in comparing this portrait with the one on the cover. This portrait was painted by Gilbert Stuart in 1800. When the painter was told that he had put the buttons on Binney's coat on the wrong lapel, he said, "Have I? Well, thank God! I am no tailor." Then he changed the coat to a double-breasted model. The color (which is claret) Stuart made up because it went well with Binney's complexion; Binney never owned a coat that color. A reproduction of the portrait appears in Charles Chauncey Binney's *Life of Horace Binney*.

Nine months later, Binney was still describing the President in radiant hues for his English correspondent, though with the customary reservations about Lincoln's physical appearance.

> The character of this President has come to be received by nearly all among us (the free North and West) as very frank, unaffected, and honest. I recollect no President, who was so little known when he came into office, who so soon, and in times of vast difficulty and very general self-seeking, as well as of great devotion to public service, has acquired a very full confidence of the people for these qualities. He seems to be an entirely sincere and honest man. He does not appear to think much of himself, but is disposed to give all he has, and is, to the country; and to shew himself always in his own clothes. Perhaps he might get handsomer; but we have been so much annoyed by pretensions in some of our Presidents, that we are not sorry to see a little more of the undress or natural style.

In March of 1862, after the Trent Affair, Binney favorably explained the President's role to Coleridge, who was naturally interested in the strained relations between the United States and Great Britain.

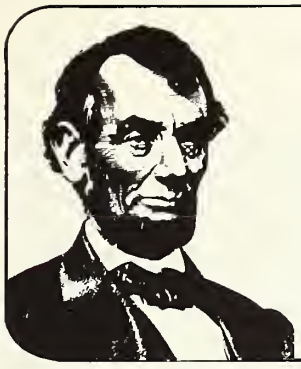
> We feel, I think, more kindly towards England since the settlement of the Trent affair; and perhaps Mr. Seward—I ought to say the President, for he is not thought to be a cipher in such matters—did well in not announcing too promptly his purpose or inclination to the people. He gains daily upon all of us, in the great attributes of integrity, a love of justice, clear good sense, untiring industry, and patriotism. He also is thought to know the people, which is a great matter, as he came in without the reputation of being able to lead them by command.

2. *The Privilege of the Writ of Habeas Corpus under the Constitution*

Fortunately for President Lincoln, Horace Binney was at his lawyerly best when, in the autumn of 1861, he wrote *The Privilege of the Writ of Habeas Corpus under the Constitution*. This is not to say merely that the Philadelphia lawyer's argument was ingenious, though many constitutional students at the time and ever since have recognized it as such, but that he eschewed unnecessary *dicta* which might have sat poorly with his jury. The jury which judged Lincoln was the American people, and they would not have taken kindly to Binney's old Federalist beliefs, to his uneasiness with democracy, and to his desire for government by those who had been sifted from the common herd by educational distinctions and conservative moral qualifications.

Lincoln's prosecutors, the Democratic politicians, would have had a field day had the ancient Philadelphia lawyer voiced the sentiments in the pamphlet which he voiced in his private letters to Alexander Hamilton's son and to skeptical British conservatives. The Democrats were having trouble distinguishing themselves from the Republicans anyway. They supported the war for the Union as much as the Republicans did, and Lincoln had not yet provided them with an issue by turning it into a war for the freedom of the Negro. Their traditional appeals to the economically disaffected had little appeal in the midst of war-induced economic prosperity. All that was left to them was the issue of civil liberties, and this would have been powerful indeed had the President's defenders justified the suspension of the privilege of the writ of *habeas corpus* as suitable discipline for an unruly democracy. As it was, Democrats would attack the suspension and Binney's defense of it time and time again, but the nature of his argument often confined them to narrow constitutional grounds and denied them any *ad hominem* argument that only crusty old Federalists supported such things in the tradition of the Alien and Sedition Acts of John Adams.

Binney's argument was strictly, which is not to say narrowly, constitutional. There was little or nothing of political philosophy in it. He merely tested the suspension of the privilege of the writ of *habeas corpus* by the various forms of constitutional argument used in his day. *(Continued in next issue)*



Lincoln Lore

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A Philadelphia Lawyer Defends the President (Cont.)

First, he addressed the language of the Constitution itself. Here, and here alone, Binney had to use "the broad constitutional and natural argument" rather than "the merely legal and artificial." The narrow legal argument would say that the clause in the Constitution does not say explicitly who can suspend, but "suspend" means by customary English usage—and it is from English law that ours derives—passing a law to countervail the writ which is instituted by law. Only Congress can make law, and thus Lincoln had no power to suspend the writ. Binney argued that such reasoning did not apply in this case because there is a peculiar American science of politics stemming from the fact that the Constitution is superior to all political power and itself makes things legal which Congress, unlike the British Parliament, cannot make legal or illegal. "Suspending the *privilege* of the Writ," he argued, "is not an English law expression. It was first introduced into the Constitution of the United States." The true reading, therefore, was this:

From the Lincoln National Life Foundation

FIGURE 1. In this detail from a ghoulish anti-Lincoln cartoon, President Lincoln, Secretary of the Treasury Salmon P. Chase, and Secretary of the Navy Gideon Welles watch as Horace Greeley and Senator Charles Sumner lower a coffin labeled "CONSTITUTION" into a grave. Other coffins are labeled "FREE SPEECH & FREE PRESS," "HABEAS CORPUS," and "UNION." The cartoon is entitled "The Grave of the Union. Or Major Jack Downing's Dream, Drawn By Zeke." It was published in 1864 by Bromley and Company in New York City. The cartoons were available at 25¢ per copy, five for a dollar, fifty for nine dollars, and one hundred for sixteen dollars. Although the constitutional argument as outlined by Horace Binney, Roger B. Taney, and Attorney General Edward Bates was dry and complex, the issue of suspending the privilege of the writ was a popular issue exploited by the Democrats in cartoons and campaign literature.

> The Constitution of the United States *authorizes* this [suspension of the privilege] to be done, under the conditions that there be rebellion or invasion at the time, and that the public safety requires it. The Constitution does not *authorize* any department of the government to *authorize* it. The Constitution itself authorizes it. By whom it is to be *done,* that is to say, by what department of the government this privilege is to be denied or deferred for a season under the conditions stated, the Constitution does not expressly say; and that is the question of the day.

To answer "the question of the day" was now easy. All Binney had to do was to determine which department of the government customarily exercised power over the sorts of questions mentioned in the *habeas corpus* clause. The executive is clearly the power which must cope with rebellion and invasion and declare when the public safety has been endangered by them. As a result of the Whiskey Rebellion of 1794 (Binney called it the Western Insurrection), a law of 1795 clearly enacted "that when the United States shall be invaded or be in imminent danger of invasion" and "whenever the laws of the United States shall be opposed, or the execution thereof be obstructed in any State, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshal by this Act, it shall be lawful for the President of the United States to call forth the militia of such State, or of any other State or States, *as may be necessary to suppress* such combinations, and to cause the laws to be duly executed." A Supreme Court decision, *Van Martin* v. *Mott* laid it down that the President's judgment was conclusive; he could decide the point at which there was rebellion. In fact, President Lincoln called forth the militia in 1861 by authority of that 1795 act.

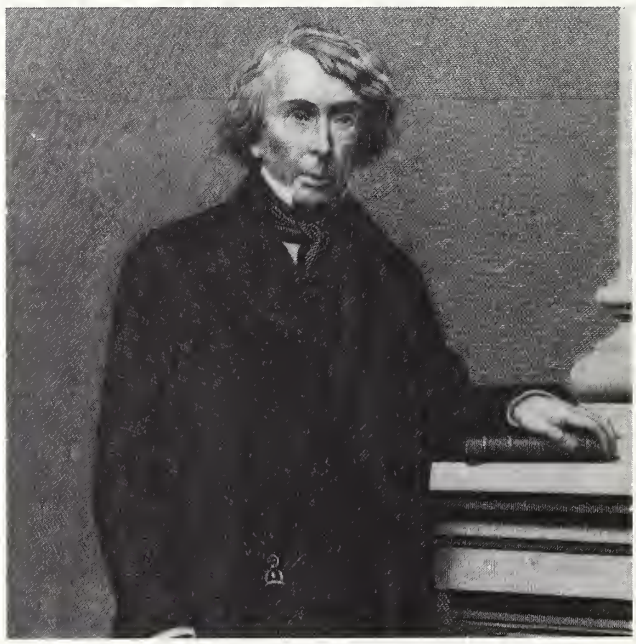
The second and most important aspect of Binney's argument was its rejection of the applicability of British example by analogy. Sydney George Fisher wrote what remains the outstanding treatment of the subject of "The Suspension of Habeas Corpus During the War of the Rebellion" for the *Political Science Quarterly* as long ago as 1888, and his summary of Binney's case in this regard merits quotation at length:

> It is true, he went on, that in England Parliament alone may suspend. But this English analogy is misleading. The American and English constitutions are very different. By the English constitution, Parliament, being omnipotent, may suspend the privilege of *habeas corpus* at any time, even in time of profound peace, and has in our own day suspended it during labor riots. The American constitution confines the suspension to rebellion or invasion. The unlimited power of suspension allowed in England would undoubtedly be dangerous in the hands of one man, but not so the qualified power of our constitution. Again, it must be observed that in England the privilege of *habeas corpus* is given, without qualification or exception, by an act of Parliament, and nothing but a subsequent act of Parliament can suspend or abridge it. But in America a single clause of the constitution recognizes the privilege and at the same time allows its suspension on certain occasions. The suspending clause in the American constitution stands in place of both the enabling and the suspending act of the English Parliament. In other words, America has a written constitution which cannot be changed by Congress, and England has an unwritten constitution which can be changed at the pleasure of Parliament. . . . Our *habeas corpus* clause is entirely un-English because it restrains the legislative power as well as all other power, and it is thoroughly American because it is conservative of personal freedom and also of the public safety in the day of danger.
>
> There is still another particular in which we must guard against analogy. The motive of the English people in putting the *habeas corpus* power entirely within the control of Parliament was their jealousy of the Crown. . . . But the framers of our constitution had no such fears of the President. The powers of his office had been substantially settled before the *habeas corpus* clause was proposed, and there was nothing in those powers to excite alarm.

Having explicated the language in the Constitution itself and having disposed of the argument by analogy with English precedent, Binney then proceeded to examine the intent of the framers of the Constitution, insofar as there was evidence in their writings or in the records of the secret Constitutional Convention of 1787. Charles Pinckney of South Carolina originally contemplated a suspension by Congress only in times of invasion or rebellion. Later, he suggested suspension by Congress on vaguer grounds ("upon the most urgent and pressing occasions") and for a limited time period stated in the Constitution itself. Gouverneur Morris of New York suggested the final language a few days later. According to Binney, the convention rejected Pinckney's English view (suspension by the legislature when it deemed it necessary) for a uniquely American view. Originally, the clause was placed in the article pertaining to the judiciary, but the committee on style placed it in the first article because that section was restrictive throughout, not because most of the section places restraints on Congress.

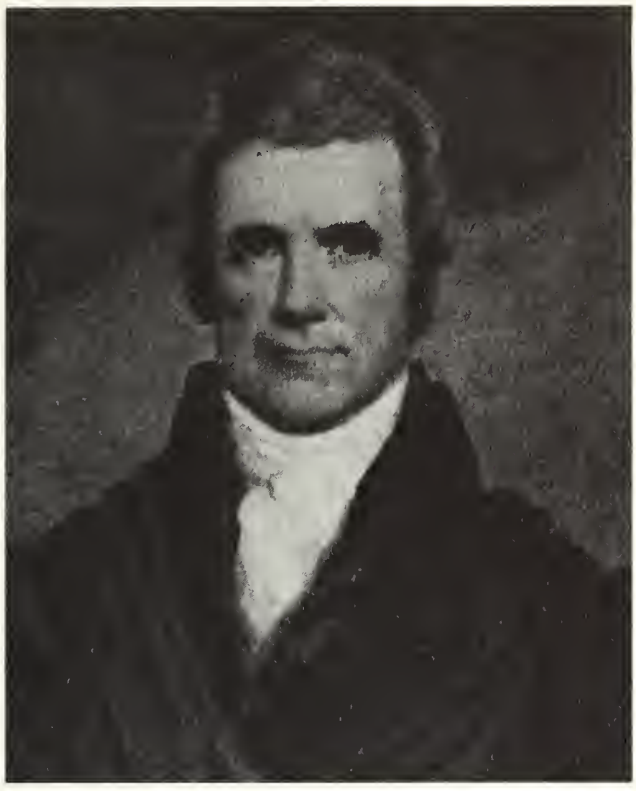
Binney then addressed the rather meagre judicial history of the clause. Taney's recent decision in the Merryman case had no authority because it did not come from the Supreme Court but from a circuit court. John Marshall's language in *Ex parte Bollman* had no bearing on the case, because there was no invasion or rebellion at the time, and neither President nor Congress had suspended. It was strictly an *obiter dictum,* not bearing on the nature of the case he had before him. Finally, Joseph Story's opinion was of little weight because it was the opinion of a *commentator* and not of a judge actually deciding a case or precedent.

Binney wrote before the era of the "sociological brief," and he did not address the question whether, in the abstract, it was better for the American people that Congress or the President have the power of suspension. He eschewed the argument from utility and confined himself to the customary lawyerly grounds for deciding a constitutional case: the language of the Constitution itself, the argument by analogy with English experience, the intent of the framers of the Constitution, the precedents in previous judicial decisions, and the opinions of learned commentators on the American Constitution. His argument was a dazzling courtroom-style performance, tightly woven on strictly constitutional and legal grounds. It astonished everybody, for, as Sydney George Fisher said



From the Lincoln National Life Foundation

FIGURE 2. Roger B. Taney



From the Lincoln National Life Foundation

FIGURE 3. John Marshall

twenty-seven years later, Americans "had supposed that the question was a settled one," and "up to the time of the rebellion it was the general opinion that Congress alone had the right to suspend." Though it prompted many outraged replies, Binney's argument also convinced a goodly number of authorities on the Constitution. Our view of Lincoln's construction of the powers of the Presidency would be much different today had this capable Philadelphia lawyer not taken time in his eighty-first year to defend the President.

3. Horace Binney and Slavery, an Epilogue

Charles Chauncey Binney carefully points out in his excellent *Life of Horace Binney* that the famed Philadelphia pamphleteer "by no means approved every act of the administration during the war, but he held that at such a time loyal men should refrain from all public criticism. He had his own opinions and he expressed them in private, but during the whole war no word fell from him which could have added the smallest feather's weight to the burden of those who were charged with the weighty task of government." By the autumn of 1862, Binney began to find fault, privately, with some of Lincoln's policies.

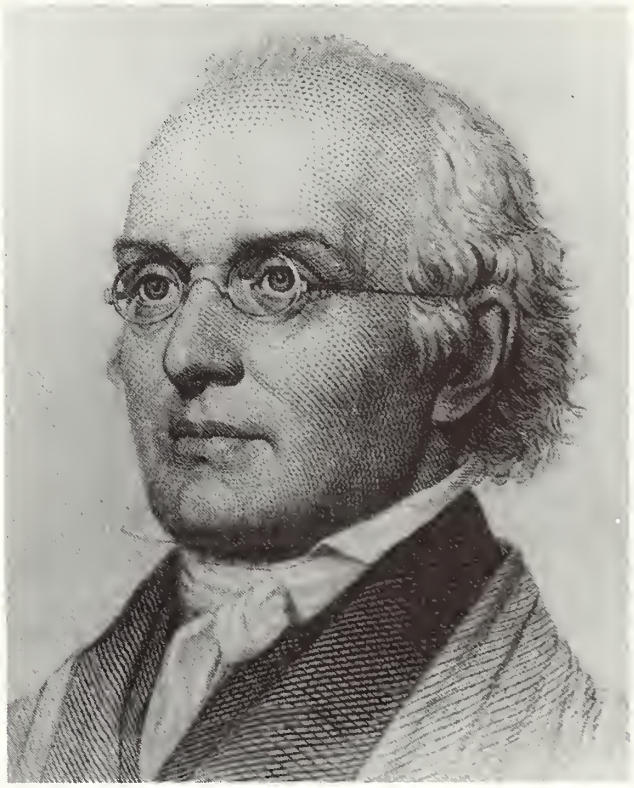
The first sign of misgiving came in an area one would deem surprising if one took Federalism to mean a form of undiluted conservatism. On August 5, 1862, almost two months before the issuance of the Preliminary Emancipation Proclamation, Binney wrote Francis Lieber a long letter about slavery, part of the contents of which follows:

> I have been much struck by the pointed and decisive answer the North is now giving to the pretence of the ambitious bad men of the South, who have poisoned their country with the belief that the North meant to uproot the institution of slavery, and therefore that it was impossible to avoid making war against us. The absence of any such Northern feeling generally, or even to a dangerous extent, is now the cause of our most dangerous and weakening divisions. Even in the midst of a war which is entirely defensive, and in the presence of imminent danger, it is the great impediment to the use of even military power to weaken the South by interfering in any way with their slaves.
>
> God knows I disapprove of the institution of slavery every way,—for its effect upon the slaves, still more for its effect upon the masters, most of all for its incompatibility, growing and incurable incompatibility, with such a government, black slavery pre-eminently. . . . I do not wish to be quoted to the President, or any of the Departments, or to anybody; but while I am not and never have been an abolitionist, in the imputed sense, I have no idea of protecting the slaves of the South in such a war, or of letting them interfere with the full use of our military means, with them or against them, to subdue the enemy. Unless this result is reached and the slaves are made to be *adstricti* [confined] to their own States, I do not see how we are to live hereafter, either united or divided.

Thus this Philadelphia conservative arrived at the position which urged some form of tampering with slave property out of military necessity before President Lincoln felt he could touch the South's peculiar institution.

When Lincoln did attack slavery, Binney expressed his first note of dismay with the President's policies. Binney's reasons were ones of constitutionality, and, by and large, he thought the President should have gone farther. Thus he wrote J.C. Hamilton on October 8, 1862:

> . . . the plans which have been adopted in the application in our immense force and resources I have sometimes disapproved when I thought I understood them, and much more frequently I have not understood them when our rulers have explained them. I go for the support of the government, as *per se* my duty, until mere obstruction shall be obviously better than what government is proposing to do; and that condition is not likely to occur. I say this in special reference to the President's Emancipation Proclamation, which is now the uppermost thing in the country. I do not understand the law of it. And do not believe there is any law for it, unless it be the law of force in war; and if it relies on that (which the Proclamation does not say, as I read it) it would, I think, have been much less disturbing to the country, and even more effectual, to have said it by way of conslusion



From the Dictionary of American Portraits, *Dover Publications, Inc., 1967*

FIGURE 4. Joseph Story

than of premises. . . . I still think the President is sincere and honest; but does the confidence of even his friends increase in his general competency?

In December, he wrote Lieber again. Binney had just read George Livermore's *Historical Research,* which the President was also reading or about to read (see *Lincoln Lore,* Number 1621). "I have travelled alongside of the muse of this history for more than sixty years," wrote Binney, "and all is written in my memory as Mr. Livermore records." He also asked Lieber what he thought of the President's recent Message to Congress. For his own part, he thought it

like his other messages, honest, sincere, and frank; and some of its *short* logic is good enough, but he does not excel, I think, in *long* logic, and I remain quite at a loss to reconcile his proclamation with his *projet* of emancipation, except by supposing that the emancipation shall apply only to those slave States which shall be represented in Congress on the 1st Jany., and to whom the proclamation seems to promise that they shall keep their slaves in slavery as they now are! I shall be glad, however, if he gets through the matter in any way, zigzag or otherwise. There is, I fear, no straight line of passage through it but force, if this people would consent to it.

By January of 1865, Binney had, despite his constant conservatism in the matter of democracy, moved along with the times (or rather ahead of them) sufficiently to write Lieber the following remarkable letter:

As to the universal suffrage of free blacks, my judgment is suspended. I have no repugnance to it. Fifty years ago, as a judge of election, I ruled that a free black native of Pennsylvania, who had paid his tax, was entitled to vote; and there was no dissent. Our Democrats, to accommodate the South, changed our [Pennsylvania] Constitution in 1838 (amended it, they said) by confining the elections to white freemen. But I have always questioned, and almost repudiated, the quietism of the Federal Constitution in turning over to the States the qualification for representatives in Congress.

Since 1903, Horace Binney has been remembered only for his pamphlet on the *habeas corpus.* Almost nothing exists in print on this remarkable man. To know him only by his pamphlet is to dismiss him as a facile conservative who was also an artful pleader of special causes. But we know today that the Federalist party, after the disappearance of which Binney never found a comfortable political home, comprehended an interesting variety of opinions. Some Federalists became politically adaptable in the declining years of their party; this was not, apparently, the case with Binney, who could never really get the hang of party politics. Some Federalists held attitudes towards slavery which were closely akin to those of later Republicans but were held back from any moral crusade by their being accustomed to an orderly hierarchical society which condemned political passion and individual self-assertion as the ultimate political sins. Binney was more at home with the America of 1861-1865 than of 1828-1856, and not merely because he could convert the Civil War to the cause of defending the authority of the national state, but because the times more nearly fit his moralistic vision of a political order. Parties were not gloried in in the 1860's, and slavery was clearly on the way out.

4. Conclusion

Binney receives honorable mention in several notable books. James G. Randall's *Constitutional Problems Under Lincoln* showed considerable respect for Binney's pamphlet. Without expressing a strong opinion as to its merits, Randall did fault Binney for his wish that the language of the Constitution had been more precise in regard to the *habeas corpus.* Writing in the age of "legal realism," Randall rather admired constitutional vagueness for the flexibility it allowed. In this respect, Randall's successor as a student of constitutional problems under Lincoln, Professor Harold Hyman of Rice University, is very much like his predecessor. Quoting a letter from Binney to Lieber with which one edition of *The Privilege of the Writ of Habeas Corpus under the Constitution* was prefaced, Hyman notes with approval that Binney thought the question "a political rather than a legal question,—a mixed political and a legal question. . . . No one should be dogmatical, or very confident, in such a matter," Hyman sounds like Randall when he adds, "At least Binney's frank inconclusiveness hit closer to constitutional realities than Taney's negative certainty or Bates's responsive geometry."

In truth, Hyman's remark and Randall's point of view both fail to capture the spirit of Binney's enterprise. After reading an answer to his pamphlet written by Judge S.S. Nicholas of Kentucky, Binney complained to Lieber:

What is the use of logic? Would you believe that for all my pains I get an answer from Judge Nicholas, which amounts to this and no more: If Congress, without the Habeas Corpus clause had taken away or not given the Habeas Corpus, how could the judiciary have helped it? God save the poor man who wastes lamp-oil on such heads! He does not perceive that this reduces it to a question of force. If the President will imprison without law, how is Congress to help it?

"What is the use of *logic?*" he said. Binney demolished Taney with constitutional logic, that is, with the traditional tools of the constitutional lawyer. For Binney, the life of the law was logic and not experience (to turn Holmes's famous saying on its head). He was vitally interested in what the Constitution actually said, whether American law was like English law, what the framers said, and what other judges said. Even the words of someone no farther removed than an accepted commentator (Story) were suspect. There was little or nothing of legal realism in this; this was a logic-chopper's work. He published no enthusiastic defense of the Emancipation Proclamation, probably for the reason that he could "not understand the law of it." Binney in no way challenged the accepted platitudes of mid-century constitutional jurisprudence. He was no less wedded to the separation of powers, say, than Edward Bates was; he simply located the ability to suspend the privilege of the writ of *habeas corpus* in that power which by long legal precedent could recognize a state of rebellion. If anything, his argument was a detriment to the advent of "legal realism," for Binney stressed a peculiarly American constitutionalism unlike that of Britain's ever-changing unwritten constitution and dashed Taney's analogy to English Parliamenttary practice to pieces.

George Fredrickson's *Inner Civil War* seems off the mark as well in its casual dismissal of Binney as a reactionary old fogey. "For Binney," says Fredrickson, "as for [Wendell] Phillips, the time of the Alien and Sedition Acts had returned, but for Binney it was an occasion for rejoicing." Binney's argument was not, apparently, opportunistic. The President had other defenders, his Attorney General and Joel Parker, for example; Binney entered the fray simply because he thought their manner of defense was wrong. He wanted to make a correct constitutional point. Nor did he rejoice uncritically in the opportunity war afforded authoritarianism. He disliked Nicholas's argument because it reduced law to mere force, and, more importantly, as his biographer points out, Binney had his differences with the Executive. Some of these were on the score that Lincoln took too authoritarian ground.

. . . it should be noted [says Charles Chauncey Binney] that he strongly disapproved of so much of the President's proclamation of September 24, 1862, as extended martial law and suspension of the Habeas Corpus to military arrests for discouraging enlistments, or for other disloyal, but not legally treasonable, acts. This proclamation went far beyond anything that Mr. Binney's pamphlets had justified, but he refrained from any public expression of his views, as he thought it the duty of loyal citizens not to hamper the administration by protests, although it might make mistakes or even exceed its legal power.

President Lincoln was indeed fortunate in having Horace Binney as his unsolicited defender. Binney himself has not been as fortunate in finding students with a sympathetic understanding of his constitutional world.

Lincoln Lore

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Mary Jane Hubler, Editorial Assistant. Published each month by the
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DON E. FEHRENBACHER ON THE DRED SCOTT CASE: A REVIEW

The date and place of his birth are unknown. His real name may have been Sam, but history knows him by a very different and unforgettable name. Some described him as a shiftless troublemaker; others commended his character. He was a slave. He had several masters over the years, and his master for an important period of the slave's life was a hypochondriac and a ne'er-do-well who was syphilitic and may have died of syphilis, though genteel doctors rarely wrote such diagnoses on the death certificates of genteel slaveholders. When he sued for his freedom, the resulting legal battle made his name a household word; yet it is not at all clear who owned him at the time of the suit. The man whom the slave sued was too insane by the time of the trial to care about the result and died in a mental institution. His real owner may have been an antislavery politician from Massachusetts. The slave's lawyer would become a member of Abraham Lincoln's cabinet, but the lawyer's deepest desire was to send the slave "back" to Africa if he won the case. The slave lost his case for freedom and was almost immediately freed by his master.

The slave's name, of course, was Dred Scott. His syphilitic owner, Dr. John Emerson, carried Dred to Illinois (a free state) and to territory north of 36° 30′ latitude acquired in the Louisiana Purchase (and, therefore, free territory). The doctor later died, officially of consumption, in Davenport, Iowa Territory. His insane owner and the man he sued was named John F. A. Sanford, misspelled "Sandford" in the official report of the Supreme Court — a fitting symbol of the errors that have plagued the history of this complex case. The antislavery politician was Calvin Chaffee, who married the widowed Mrs. Emerson (*nee* Sanford), the sister of John F. A. Sanford. Scott's famous lawyer was Montgomery Blair, an ardent advocate of black colonization.

Professor Don E. Fehrenbacher of Stanford University has written what is sure to be the definitive book on the subject: *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978). Yet "definitive" is not a good enough word, for a definitive book can also be ponderous, poorly written, and doggedly comprehensive without a hint of brilliance or innovation. On the contrary, this book is so clearly written as to be a model for all constitutional history written hereafter. It is as lively a treatment as is possible of an extremely difficult subject. Its conclusions are both sane and balanced on the one hand, and brilliantly perceptive and original, on the other. It is an achievement to be envied by any historian.

From the Louis A. Warren Lincoln Library and Museum

FIGURE 1. Roger B. Taney (1777-1864) feared that the "South is doomed to sink to a state of inferiority, and the power of the North will be exercised to gratify their cupidity and their evil passions, without the slightest regard to the principles of the Constitution."

Moreover, *The Dred Scott Case* is more than the best book ever written on the only Supreme Court case "every schoolboy" has heard of, it is practically a primer on constitutional law and the law of slavery, a brief history of the sectional issue in American politics, and a carefully reasoned argument about the causes of the Civil War. These are serious subjects, of course, and not ones that can merely be read about every night before going to sleep. They must be studied, and Professor Fehrenbacher's book must be studied. There is no problem with the writing style, which is lucid and lively, but the subject matter is difficult. Suffice it to say, that a chapter discussing the Lecompton constitution for Kansas, which many historians of the Civil War period regard as a nearly hopeless labyrinth of confusion, comes as a *relief* after the discussion of the issues raised in and by the Dred Scott decision.

Since *The Dred Scott Case* comprehends so many different subjects, its thesis cannot be neatly summarized in a sentence or two. In fact, it abounds in useful distinctions and insights on many different points. However, if one must say what the book argues in the main, it might be this: the Dred Scott decision was not an aberration, an inexplicably explosive decision from the hands of an otherwise restrained and erudite Chief

Justice, Roger Brooke Taney. The decision was consistent with his pro-Southern record and his willingness to see the United States Supreme Court intervene in difficult problems that plagued American politics. Moreover, the decision can be aptly characterized as a sloppy and tortured defense of Southern political interests from what militant Southerners perceived as a merciless Northern onslaught. As Fehrenbacher puts it, "the true purpose of Taney's Dred Scott opinion" was "to launch a sweeping counterattack on the antislavery movement and to reinforce the bastions of slavery at every rampart and parapet." The tone of Fehrenbacher's characterization of Taney's decision goes a good deal farther than the acknowledgment by Taney's judicious and fair-minded biographer, Carl Brent Swisher, that the Maryland-born Chief Justice wrote a decision that was defensive of the only section of the country he knew and the section he loved.

The two traits which most distinguish every part of Fehrenbacher's large book (595 pages of text and over 100 pages of footnotes) are balance and rigorous logic. Professor Fehrenbacher shares with his late colleague at Stanford, David M. Potter, a remarkable ability to show no sectional bias in any of his interpretations of American sectional conflict. He treats the causes and personalities of North and South with even-handed justice without at the same time excusing extremism and unreasonableness. It is this record of balance in appraising the sectional controversy up to the time of the Dred Scott decision which makes all the more devastating Fehrenbacher's relentless destruction of the court's opinion in that case.

The weapon of destruction is logic based on close and thoughtful reading of Taney's decision. Well before the point where he analyzes Taney's opinion, Fehrenbacher has repeatedly split arguments and distinctions into As and Bs and 1, 2, 3s — all to the benefit of the reader, always for the sake of clarification, and never with a false step. When he treats Taney's decision with the same precision, the results are remarkable.

To look closely at Taney's decision is in itself innovative despite the great fame of the Dred Scott case. The reasons for its being ignored in the past are many. Republican critics at the time, for example, were anxious to say that much of the decision was *obiter dictum*, that is, present in Taney's opinion but not crucial as a reason for deciding the case. Therefore, to many Republicans, there was no reason to examine much of the decision closely because much of the decision consisted of the irrelevant opinions of the Chief Justice on matters not at the heart of the case. Republican critics at the time, and a host of historians since, have tended also to focus on the question of the authoritativeness of the opinion as judged by how many of the Court's Justices concurred with or dissented from each of the various points made in the case. This has led to what Professor Fehrenbacher calls the "box-score method" of analyzing the Dred Scott decision, and he shows how absurd such interpretations are.

Fehrenbacher thinks it an error to seek ways of ignoring the decision. He looks at the decision itself, and what he sees in it is remarkable. Taney, for example, said that every "citizen" was a member of "the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives." This, Fehrenbacher points out, was a "gross inaccuracy": "A large majority of American citizens — namely, women and children — were not members of the sovereign people in the sense of holding power and conducting the government through their representatives." Negroes may not have been citizens but not for the reason Taney here described.

Likewise, Taney's assertion that, in the times of the Founding Fathers, Negroes "had no rights which the white man was bound to respect" was a "gross perversion of the facts." Taney's statement confused free Negroes with slaves, and, even then, "the statement was not absolutely true, for slaves had some rights at law before 1789." In fact, there were some respects in which "a black man's status was superior to that of a married white woman, and it was certainly far above that of a slave." The free black man "could marry, enter into contracts, purchase real estate, bequeathe property, and, most pertinently, seek redress in the courts." Republicans quoted Taney's harsh statement about white respect for Negro rights out of context as though it represented the Chief Justice's own views. Taney's defenders have pointed out that these were the opinions Taney said the Founding Fathers had; Taney was writing "historical narrative" here. Fehrenbacher shows that the statement was grossly prejudiced even as "historical narrative."

Taney's tortuous efforts to deny Negro citizenship were functions of his sectional fears and even of his Maryland background. He feared free Negroes, and he imputed this fear to the Founding Fathers, arguing that the slave states would never have ratified the Constitution if free Negroes had been included in the meaning of "citizens." Said Taney:

> For if they were . . . entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race . . . the right to enter every other State whenever they pleased, . . . to go where they pleased at every hour of the day or night without molestation, . . . and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

Maryland was a state with a high population of free Negroes, and Taney's experience in such a state led him to forget that earlier in his opinion he had said that free Negroes were so few in number when the republic was founded that they "were not even in the minds of the framers of the Constitution." By his own admission, almost, Taney's mind and not the minds of the framers was dictating constitutional law here. In fact, as Fehrenbacher shows, Taney went to such lengths to exclude Negroes from the possibility of being naturalized citizens that his opinion made them *"the only people on the face of the earth who (saving a constitutional amendment) were forever ineligible for American citizenship."*

Fehrenbacher not only labels but proves Taney's history of the United States "phantasmal." He repeatedly demonstrates the Chief Justice's "chronic inability to get the facts straight." The important *obiter dictum* in the decision was not what Republicans usually criticized, but rather Taney's statement that a territorial government could not forbid slavery — "a question that had never arisen in the Dred Scott case." This, too, was a function of Southern fears. Fehrenbacher concludes that Benjamin Curtis and John McLean, the dissenting Northern Justices, "were in many respects the sound constitutional conservatives, following established precedent along a well-beaten path to their conclusions." By contrast, "Taney and his southern colleagues were the radical innovators — invalidating, for the first time in history, a major piece of federal legislation; denying to Congress a power that it had exercised for two-thirds of a century; sustaining the abrupt departure from precedent in *Scott v. Emerson* [an earlier stage of the case on its way to the Supreme Court]; and, in Taney's case, infusing the due-process clause with substantive meaning. And even though McLean did indulge his weakness for playing to the antislavery gallery, the southern justices were by far the more idiosyncratic and polemical."

It all sounds too pro-Northern to be true, but the balance with which Fehrenbacher treats the sectional crisis leading up to the decision and the balance of his appraisal of the decision's effects are the reader's assurance that Fehrenbacher's arguments have been carefully weighed. In the section of the book preceding the treatment of *Dred Scott v. Sandford,* Fehrenbacher traces the sectional controversy from the early period when the slave *interest* always triumphed over the antislavery *sentiment* in American politics, to the time when both became interests and tangled American politics in bitter and unresolvable disputes. There are far too many useful insights in this graceful, but thorough, survey to catalogue them all here, but one can at least see an example of Fehrenbacher's balanced approach.

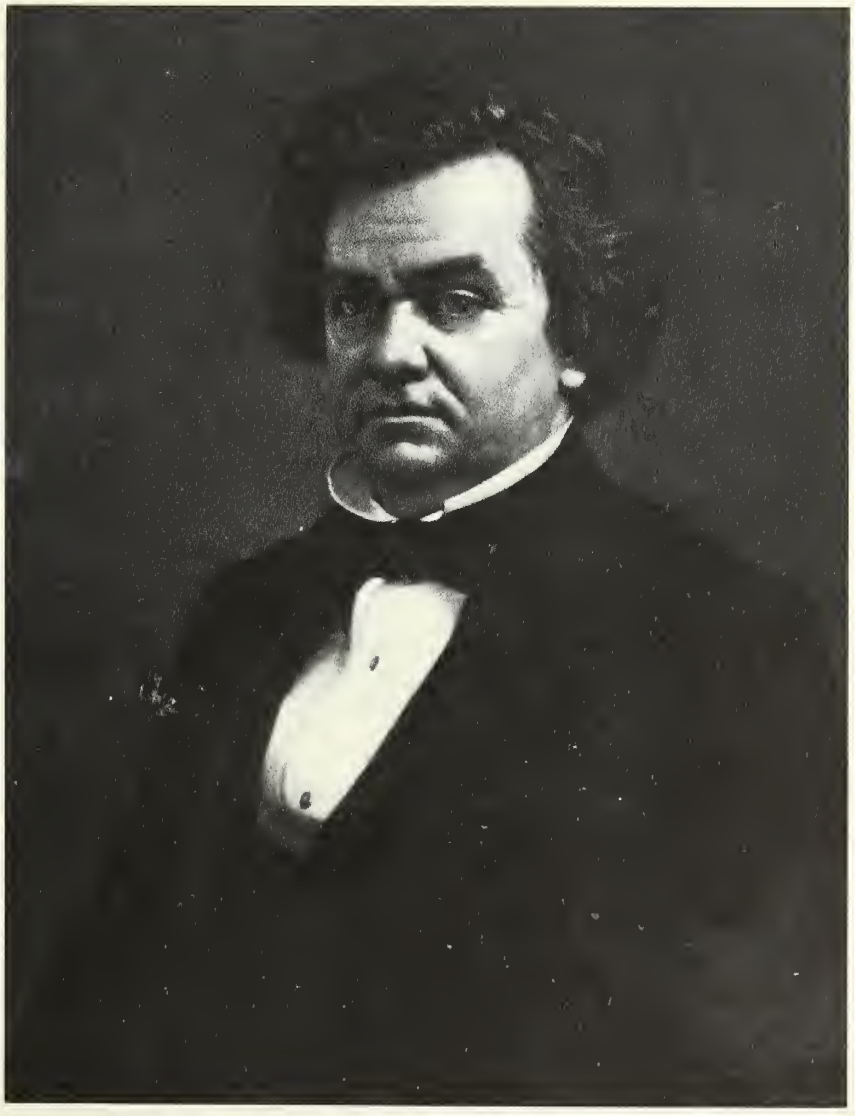
The fugitive-slave clause in the Constitution was a matter of little interest to the convention which passed it — late in the proceedings, by unanimous vote, and after little debate. Yet the myth soon arose that its passage had been essential to the acceptance of the Constitution by the slave states, a myth which was mouthed by the great Joseph Story in *Prigg v. Pennsylvania* (1842). He said the clause "constituted a fundamental article, without the adoption of which the Union could not have been formed." Thus the South gained unfair advantage here, Fehrenbacher says, and the federal govern-

ment became "a bulwark of slavery [,]. . . a development permitted but not required by the Constitution. It reflected not only the day-to-day advantage of interest over sentiment and the predominance of southern leadership in the federal government but also the waning of the liberal idealism of the Revolution." Here Professor Fehrenbacher sounds almost like the Republican Lincoln. He seems to voice an anti-Southern view of American history as a decline from the libertarian virtues of the Founding Fathers, a decline brought about the gradual erosion of the sentiment that slavery was wrong for the sake of the South's economic interest in slavery. Yet just five pages later, Fehrenbacher notes that Southerners were fair in their willingness to distinguish between "domicile" and "sojourn" in cases involving the presence of slaves in free states. If the slaveowner had taken up residence, the slaves were clearly free. If he was merely passing through on a sojourn, the slaves retained their original servile status. At first, Southern courts did not embrace the doctrine of "reattachment," whereby a slave returned to his home-state status when he returned to his home state, even if he had been in residence on free soil. Fehrenbacher says plainly, though, that the "northern states were the first to turn away from the tacit understanding" whereby courts in the two sections recognized the difference between domicile and sojourn. The quality of Southern justice did not change without provocation. This is balance.

Likewise, Fehrenbacher gives a balanced appraisal of the aftermath and consequences of the Dred Scott decision, and, as C. Vann Woodward has pointed out in another review of this book in the *New York Review of Books*, it is a modest appraisal. Fehrenbacher does not exaggerate the effects of the decision in his own views of the causes of the Civil War. If anything, he argues that the case was not as significant as historians have vaguely thought it was in causing the war.

One of Fehrenbacher's most interesting points is that the fight over the Lecompton constitution for Kansas and the personal image and reputation of Stephen A. Douglas were far more important than the Dred Scott decision in causing the war. A narrow decision which said nothing about Negro citizenship or the constitutionality of the Missouri Compromise line might not have averted sectional disaster. The effect of the Dred Scott decision was indirect. It "had no immediate legal effect of any importance except on the status of free Negroes. . . . it provoked no turbulent aftermath, presented no problem of enforcement, inspired no political upheaval." The Dred Scott decision "was in some ways like an enormous check that could not be cashed" by Southern leaders. The psychological frustration of intangible victory played a role but "only belatedly and indirectly." What was vital was "certain later developments."

The later developments in question revolved around the Lecompton controversy, "the last sectional crisis to end in compromise" and, therefore, "the close of the antebellum era in national politics." Fehrenbacher explains in a believable way the hopes and fears that were invested in that controversy. The Northern Democrats, having accepted as best they could the pro-Southern court decision, were in no condition to bear the weight of another Southern victory, and President Buchanan made a terrible error in asking them to do so. Stephen Douglas, who was much more the great compromiser of the 1850s than Henry Clay, seems out of character in spurning a practical political compromise on the Lecompton issue. Fehrenbacher carefully notes, however, Douglas's increasing inflexibility before that controversy, as



From the Louis A. Warren Lincoln Library and Museum

FIGURE 2. Stephen A. Douglas, determined but a little dissipated, became the focus of fierce Southern animosity in the year of the Dred Scott decision, but not because of the decision. His break with the Buchanan administration over the Lecompton constitution for Kansas made him "suddenly, . . . a party insurgent and a doctrinaire, taking an inflexible stand on principle and in the end rejecting a compromise that satisfied even many of his fellow insurgents." Southern newspapers declared "war to the knife," and some expressed "serene indifference" to the outcome of his race against Lincoln for the United States Senate in 1858. The Mobile *Register* saw Douglas as "the worst enemy of the South and the most mischievous man now in the nation." When Democrats tried to select a nominee for President in 1860, Fehrenbacher says, "a majority . . . from the Deep South preferred to break up their party rather than accept the nomination of Douglas."

he participated in "the fashion of constitutionalizing debate on slavery in the territories." He had already moved from recommending his solution for the territorial issue to saying that the Constitution *demanded* his solution to the issue.

When Douglas took his anti-Lecompton and anti-Southern stand, it "proved to be the crucial event that set the Democratic party on the path to disruption." The intensity of Southern attacks on Douglas was the intensity of hatred, not for an alien enemy, but for a *traitor.* As a Georgia editor put it, "Douglas was with us until the time of trial came; then he deceived and betrayed us." His defection was a symbol of the failure of the last hope for Northern fairness. Thereafter, the South was desperate and frantic. The coming of the war was at times a function of an almost *ad hominem* argument by Southerners against Douglas. Many historians have thought that the "Freeport Doctrine," announced by Douglas in his famous debates with Lincoln, made Douglas unacceptable to the South. Fehrenbacher is prepared to say, on the contrary, that the doctrine was made unacceptable by Douglas's advocacy of it.

Professor Fehrenbacher has long been associated with the view that the importance of the Freeport question has been greatly exaggerated. That was one of the revolutionary points of his brilliant book, *Prelude to Greatness: Lincoln in the 1850's.* In *The Dred Scott Case,* he is able to argue an even more convincing case for it by focusing more on Douglas than Lincoln. But what about Lincoln? How does he figure in this new work?

Fehrenbacher makes some interesting points. First, Lincoln's criticism of the Dred Scott case was not like the mainstream of Republican criticism which tried to dismiss the controversial parts of the decision as mere *obiter dicta.* Lincoln, instead, took the tack that a Supreme Court decision, though it must ultimately become authoritative, did not necessarily reach that authoritative status unless it were grounded in sound historical facts, were repeated by the Court in several decisions, represented the views of the bulk of the Justices, and met numerous other conditions that were functions of time. Likewise, Lincoln's first (and truest?) response to the decision was to denounce the historical absurdity of Taney's assertions about the state of opinion of the Founding Fathers on the Negro and to document a decline in recent times from the rather decently libertarian sentiments of the framers of the Constitution. His better-known response came a year later, in 1858, and in the midst of a dogged struggle with Douglas for the United States Senate. In negrophobic Illinois, Lincoln did not need to be seen, as Douglas tried to picture his opponent's opposition to the Dred Scott decision, as primarily concerned about Taney's denial of Negro citizenship. Illinois did not want Negro citizens, but Illinois feared Southern political power, and Lincoln thereafter characterized Taney's decision as part of a conspiracy, begun by Douglas in 1854 and continued by Presidents Pierce and Buchanan, to nationalize slavery. Lincoln concentrated less and less on the lamentable doctrines in the Dred Scott decision itself. Instead he warned of a *second* Dred Scott decision which would make not only Congress and territories but also *states* incapable of outlawing slavery.

Professor Fehrenbacher further establishes his reputation as a fine writer in this book. It does seem that his prose has become slightly less formal than it used to be. He occasionally uses colloquial terms: "mixed bag" (page 342); "continuing on" (page 366); and "finish up" (page 536). Whether by calculation or by virtue of the spirit of the times, which have altered our language more in the direction of the common man, this has the effect, not of spoiling his excellent writing, but of making this book on a subject of forbidding complexity more palatable to the reader.

No book, of course, is beyond criticism. Because much of the book's import hinges on an accurate appraisal of Taney's personality and political thought, it is a shame the Chief Justice remains such a shadowy figure. The Dred Scott opinion was the opinion of a very old man; it might be interesting to know whether some of the glaring faults of the opinion followed a pattern of declining mental powers generally in his late opinions. It seems odd, given the particular shape Taney's opinion took, that there is no investigation of the doctrines of the age to which it seems an answer. That is, Salmon P. Chase and others had been forging an antislavery interpretation of the Constitution, and the Declaration of Independence loomed large in antislavery arguments. Was Taney's preoccupation with the Founding Fathers strictly a function of a judicial need to know the opinions of the framers of the document from which American law derived? Did not Republican ideology shape his defense as much as the demands of Southern interests and of constitutional law?

There are doubtless other and better questions yet to be answered, but Fehrenbacher's book answers many more questions that it begs. *The Dred Scott Case* is a great book, far too great to be comprehended in any single review (or reading). Every serious student of the period must read it, and, because of Professor Fehrenbacher's careful research and attention to clarity in writing, the reading will be an unalloyed pleasure.

AN IMPORTANT ANNOUNCEMENT

Professor Fehrenbacher has generously consented to present the second annual R. Gerald McMurtry Lecture. The 1979 Lecture will occur on the night of May 10, at the Louis A. Warren Lincoln Library and Museum. The Lecture is free to the public and is followed by an informal reception for the lecturer. For further information, please write Mark Neely, Louis A. Warren Lincoln Library and Museum, 1300 South Clinton Street, Fort Wayne, Indiana 46801.

From the Louis A. Warren Lincoln Library and Museum

FIGURE 3. Professor Don E. Fehrenbacher.

Lincoln Lore

May, 1980

Bulletin of the Louis A. Warren Lincoln Library and Museum. Mark E. Neely, Jr., Editor.
Mary Jane Hubler, Editorial Assistant. Published each month by the
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Number 1707

A Progressive Admiration: Theodore Roosevelt and Abraham Lincoln

The Progressive Era was a great period for American historical writing. The two most learned Presidents since Jefferson, Theodore Roosevelt and Woodrow Wilson, occupied the White House in this age of reform. Both men were historians. The historical discipline was becoming more professionalized every day. With the deaths of the contemporary writers who knew Abraham Lincoln personally — William H. Herndon, Ward Hill Lamon, Isaac N. Arnold, John G. Nicolay, and John Hay — Lincoln scholarship was becoming more critical and objective. One of the masterpieces of Lincoln literature, Lord Charnwood's biography, appeared near the end of the era. A Republican and Progressive, Albert J. Beveridge, would soon bring writing on Lincoln into the mainstream of professional historical scholarship.

The greatest spur to the study of Lincoln in this period was the celebration of the centennial of his birth in 1909. To this factor, one must surely add Theodore Roosevelt's interest in the life of the Sixteenth President. It was a lifelong interest inherited from his father. Although Theodore Roosevelt, Sr., had married into a Georgia slaveholding family, he was an ardent Republican. He apparently met the President and Mrs. Lincoln while he was in Washington in 1862, working to establish a system whereby allotments for soldiers' families could be deducted from their pay before all the money went into the hands of corrupt sutlers and liquor peddlers. The elder Roosevelt served on the United States Allotment Commission in New York and performed considerable work for the common soldiers and their families. He knew Nicolay and Hay well.

Theodore Roosevelt, Sr., though a young man during the Civil War, chose to hire a substitute for his army service rather than to enlist. Some have speculated that his son later exhibited great zeal for combat out of embarrassment at his father's course during the war. The father certainly influenced the son in more direct ways. From his father, the future President gained an admiration for the Republican party, a penchant for trying to help the common man, and a keen interest in Abraham Lincoln.

Roosevelt's view of Lincoln changed with time. Before the turn of the century, his admiration of the Sixteenth President was conventional for a budding Republican politician with a sense of history. Roosevelt considered slavery "a grossly anachronistic and un-American form of evil," and he naturally admired the man who ended it. He hated "the professional Abolitionists." They were the sort of people who always agitated about something and, in the case of slavery, they happened for once to be correct. Roosevelt thought that the ultimate extinction of slavery had been a certainty, but it might have taken another hundred years without the Civil War. In sum, he liked Lincoln's moderation.

Around the time of the Spanish-American War, when Roosevelt was Assistant Secretary of the Navy, he had a rather special interpretation of Lincoln's life. "I feel that in this age we do well to remember," Roosevelt told the Republican Club of New York on Lincoln's Birthday in 1898, "... that Abraham Lincoln, who prized the material prosperity of his country so much, prized her honor even more, that he was willing to jeopardize for a moment the material welfare of our citizens that in the long run her honor might be established." A jingoist critique of men who valued the stock market more than the national honor followed and was aimed at the many businessmen who had little enthusiasm for American imperialism.

From the Louis A. Warren Lincoln Library and Museum

FIGURE 1. Theodore Roosevelt.

Early in Roosevelt's career, Lincoln appears to have been his second choice among historical heroes. George Washington was, "not even excepting Lincoln, the very greatest man of modern times," Roosevelt told Henry Cabot Lodge in 1884. Almost a decade later, he was still describing Washington as the "greatest of Americans" and an exemplar of the sort of national greatness forged by "feats of hardihood, of daring, and of bodily prowess." Hunting in his youth had made Washington a great man.

Later in his life, Roosevelt was careful to link the two

men's names in public utterances. He referred always to "the two greatest statesmen this country has ever had." He never said publicly that he preferred the one or the other. Like his friend Henry Cabot Lodge, Roosevelt was also a great admirer of Alexander Hamilton, but Hamilton was far too anti-democratic in political sentiment to be very quotable by an active politician. Roosevelt, however, professed to see a lot of Hamiltonian Federalisim in Lincoln:

> He [Lincoln] seized — half unwittingly — all that was best and wisest in the tradition of Federalism; he was the true successor of the Federalist leaders; but he grafted on their system a profound belief that the great heart of the nation beat for truth, honor, and liberty.

Roosevelt despised Thomas Jefferson. He thought "the worship of Jefferson a discredit" to his country, and the more he studied Jefferson, the more profoundly he distrusted him. He was "the most incapable executive that ever filled the presidential chair," but he "did thoroughly believe in the people, just as Abraham Lincoln did." For a man who detested Jefferson, Lincoln was a crucial link to America's liberal tradition. The more liberal and reform-minded Roosevelt grew, the more interested he became in Lincoln. Neither the conservative Hamilton nor the bland Washington could supply that vital impulse.

As early as 1885, Roosevelt critized a Supreme Court decision which favored conservative interests by referring to Lincoln's critique of the Dred Scott decision. Most often, however, it was Lincoln's practicality and moderation which appealed to Roosevelt. In 1900 he told a correspondent that, even though Lincoln was one of the two greatest Americans, he had made mistakes. Appointing Simon Cameron as Secretary of War and making General Ambrose E. Burnside commander of the Army of the Potomac were big mistakes, but Lincoln had to work with the materials at hand to achieve his goals. He could not, for example, accomplish anything by ignoring Cameron's influence in Pennsylvania. "If Lincoln had not consistently combined the ideal and the practicable," Roosevelt concluded, "the war for the union would have failed, and we would now be split in half a dozen confederacies."

When, as President of the United States, Roosevelt faced a serious anthracite coal strike in 1902, he recalled reading Nicolay and Hay's history of the Lincoln administration and took inspiration from their depiction of the Sixteenth President as a resolute man badgered by contradictory advice from extremists on both sides. What Roosevelt liked best about Lincoln in this period of his life was his strong conception of the Presidential office. Roosevelt had "a definite philosophy about the Presidency," he told Henry Cabot Lodge in 1908. "I think it should be a very powerful office, and I think the President should be a very strong man who uses without hesitation every power that the position yields." In fact, he called this the "Jackson-Lincoln theory of the presidency," and he contrasted it with "the Buchanan principle of striving to find some constitutional reason for inaction." As he neared the end of his second term in 1908, Roosevelt pointed to Washington and Lincoln as strong Presidents who acted in a disinterested way as the people's Presidents. He still mentioned Washington with Lincoln, but Lincoln was the really important figure in justifying Roosevelt's active conception of the Presidency. He had said years earlier that Lincoln "was the first who showed how a strong people might have a strong government and yet remain the freest on earth."

William Howard Taft was Roosevelt's handpicked successor, but his conception of the Presidential office was far different from Roosevelt's. The restless ex-President quickly moved into sharp opposition to Taft's brand of Republicanism. Roosevelt's view of Lincoln moved with him steadily to the left. At Ossawatomie, Kansas, in 1910, Roosevelt declared that property should be the servant and not the master of America, and he legitimized his radical doctrine by quoting from Lincoln's first annual message to Congress:

> Labor is prior to, and independent of, capital. Capital is only the fruit of labor, and could never have existed if labor had not first existed. Labor is the superior of capital, and deserves much the higher consideration.

At the Lincoln birthday banquet of the Republican Club of New York in 1911, Roosevelt spoke on "Abraham Lincoln and Progressive Democracy." He was no longer celebrating the moderate President Lincoln, who had mediated between the extremists during the Civil War. Now he hailed Lincoln for meeting "the problems of the present, not by refusing to use other methods than those that had solved the problems of the past, but by using the new methods necessary in order that the old principles could be applied to the new needs." This progressivism, Roosevelt insisted, made Lincoln "the real heir of George Washington."

Roosevelt still could not muster any enthusiasm for Thomas Jefferson, who inspired other liberal reformers in this era.

> The founders of our Government, the men who made the Constitution and who signed the Declaration of Independence, tended to divide into two groups, those under Hamilton, who believed in a strong and efficient government, but who distrusted the people; and those under Jefferson, who did not believe in a strong or efficient government, but who in a certain sense did trust the people — although it was really distrust of them to keep the government weak. And therefore for decades we oscillated between the two tendencies, and could not develop the genuine strength that a democracy should have until Abraham Lincoln arose, until he and the men with him founded the Republican party on the union of the two ideas of combining efficient governmental force with genuine and whole-hearted trust in the people.

Roosevelt supported increasingly liberal reform ideas, including the recall of judicial decisions. In criticizing the Supreme Court, the ex-President invoked Lincoln's denunciation of the Supreme Court of Roger B. Taney and the Dred Scott decision. Roosevelt repeatedly linked his New Nationalism and his third-party candidacy for the Presidency on the Progressive ticket with the heritage of Abraham Lincoln.

All this was too much for the living link to the Sixteenth President, Robert Todd Lincoln, to swallow. Though he rarely engaged in public disputes over the meaning of his father's life, Robert, a Taft Republican, felt that he had to answer Theodore Roosevelt. The resulting public letter from Lincoln's son is a remarkable document which testifies to the changes in the Lincoln family's political beliefs over the years.

> The Government under which my father lived was, as it is now, a republic, or representative democracy, checked by the Constitution which can be changed by the people, but only when acting by methods which compel deliberation and exclude so far as possible the effect of passionate and short-sighted impulse. A Government in which the checks of an established Constitution are actually, or practically omitted — one in which the people act in a mass directly on all questions and not through their chosen representatives — is an unchecked democracy, a form of Government so full of danger, as shown by history, that it has ceased to exist except in communities small and concentrated as to space. A New England town meeting may be good, but such a Government in a large City or State, would be chaos.
>
> As I understand it, the essence of Mr. Roosevelt's proposals is that we shall adopt the latter form of Government in place of the existing form. This, in simple words, is a proposed revolution, peaceful perhaps, but a revolution.

Robert thought that such a revolution would "surely . . . lead to attempted dictatorships."

Robert not only disagreed politically with the form of government he thought Roosevelt was promoting but also believed that Roosevelt was in error in asserting that there were Abraham Lincoln texts which supported such doctrine. "President Lincoln," said his son, "wrote many letters, made many public addresses and was the author of many documents. I do not know of the existence in any of them of a word of censure, or of complaint of our Government, or of the methods by which it was carried on." Roosevelt's proposal for the recall of judicial decisions brought a specific response:

> His [Lincoln's] attitude toward the Dred Scott decision is urged as in support of the pernicious project for the recall by popular vote, of judges and of judicial decisions. He thought it an erroneous decision, but his chief point in reference to it was not its error, but that it indicated a scheme, and was a part of it, for the nationalization of human slavery. He never suggested a change in our government under which the judges who made it should be recalled, but said that he would resist it politically by voting, if in his power, for an act prohibiting slavery in United States territories, and then endeavor to have the act sustained in a new proceeding, by the same court reversing itself.

Finally, Robert interpreted the Gettysburg Address for Roosevelt by asserting that, when Lincoln "prayed (if I may use the word) that 'Government of the people, by the people, for the people, shall not perish from the earth,' he meant, and could only mean, that government under which he lived, a representative government of balanced executive, legislative and judicial parts, and not something entirely different — an unchecked democracy."

The great irony, if not tragedy, of this misunderstanding between Robert T. Lincoln and Theodore Roosevelt was that both men sincerely revered Abraham Lincoln's legacy and that both were quite knowledgeable about him. To be sure, Roosevelt said always that Lincoln *and* Washington were the greatest men our republic had produced. Even when he spoke at the dedication of Gutzon Borglum's Lincoln statue in Newark in 1912, Roosevelt complimented the people of Newark for commemorating "in fit form one of the two greatest statesmen that this country has ever had." It seems as though it was almost a political effort always to mention Lincoln and Washington together. Sectionalism may have been strong enough and Lincoln's image partisan enough still to necessitate paying homage to a Virginia hero as well.

Lincoln grew more "progressive" over the years in Roosevelt's view, and he apparently grew progressively more important for Roosevelt. In private utterances, Roosevelt seemed less reluctant to mention Lincoln without at the same time recalling Washington's memory. Close association with John Hay, who served as Secretary of State under Roosevelt, certainly increased his interest in Lincoln. After Hay's death in 1905, Roosevelt told Lyman Abbot:

> John Hay's house was the only house in Washington where I continually stopped. Every Sunday on the way back from church I would stop and have an hour's talk with Hay. We would go over foreign affairs and public business generally, and then I would usually get him to talk to me about Lincoln — for as you know, Lincoln has always meant more to me than any other of our public men, even Washington.

From the Louis A. Warren Lincoln Library and Museum

FIGURE 2. Robert Todd Lincoln.

That same year, Hay had sent Roosevelt a ring to wear at his inauguration as President of the United States.

> DEAR THEODORE:
>
> The hair in this ring is from the head of President Lincoln. Dr. Taft cut it off the night of the assassination and I got it from his son — a brief pedigree.
>
> Please wear it tomorrow; you are one of the men who most thoroughly understand and appreciate Lincoln.
>
> I have had your monogram and Lincoln's engraved on the ring.
>
> *Longas, O utinam, bone dux, ferias Praestes Hesperiae*
>
> Yours affectionately
> JOHN HAY

In Roosevelt's *Autobiography*, written in 1913 at the height of his Progressivism, he recalled Hay's gift:

> John Hay was one of the most delightful of companions, one of of most charming of all men of cultivation and action. Our views on foreign affairs coincided absolutely; but, as was natural enough, in domestic matters he felt much more conservative than he did in the days when as a young man he was private secretary to the great radical democratic leader of the '60's, Abraham Lincoln. . . . When I was inaugurated on March 4, 1905, I wore a ring he sent me the evening before, containing the hair of Abraham Lincoln. The ring was on my finger when the Chief Justice administered to me the oath of allegiance to the United States; I often thereafter told John Hay that when I wore such a ring on such an occasion I bound myself more than ever to treat the Constitution, after the manner of Abraham Lincoln, as a document which put human rights above property rights when the two conflicted.

Shortly before he gave his address on Lincoln in Hodgenville, Kentucky, on the hundredth anniversary of Lincoln's birth, Roosevelt told his son, Theodore Roosevelt, Jr., "Lincoln is my great hero, as you know, and I have just put my heart into this speech."

Theodore Roosevelt did much to keep Lincoln in the public eye. As Roosevelt changed over time, so did his image of the Sixteenth President. At first he celebrated the practical moderate who injected popularity into the party of strong government. Later, Roosevelt invoked the image of a radical democrat who kept the country's vital principles alive by inventive applications of them to a changed political environment. Through it all, Roosevelt's degree of interest in Lincoln grew in intensity. Even though publicly he was careful to tout Lincoln and Washington together as America's two greatest heroes, in private he admitted, "For some reason or other he [Lincoln] is to me infinitely the most real of the dead Presidents." Washington gained only a sort of obligatory fealty from Roosevelt. He never engaged Roosevelt's rhetorical attention as Lincoln did. Theodore Roosevelt admired Washington as a statue, but he admired Lincoln as a man.

CUMULATIVE BIBLIOGRAPHY 1979-80

by Mary Jane Hubler

Selections approved by a Bibliography Committee consisting of the following members: Dr. Kenneth A. Bernard, 50 Chatham Road, Harwich Center, Mass.; Arnold Gates, 289 New Hyde Park Rd., Garden City, N.Y.; Carl Haverlin, 8619 Louise Avenue, Northridge, California; James T. Hickey, Illinois State Historical Library, Old State Capitol, Springfield, Illinois; E.B. (Pete) Long, 607 S. 15th St., Laramie, Wyoming; Ralph G. Newman, 175 E. Delaware Place, 5112, Chicago, Illinois; Hon. Fred Schwengel, 200 Maryland Avenue, N.E., Washington, D.C.; Dr. Wayne C. Temple, 1121 S. 4th Street Court, Springfield, Illinois. New items available for consideration may be sent to the above persons, or the Louis A. Warren Lincoln Library and Museum.

1979

LINCOLN MEMORIAL UNIVERSITY 1979-22

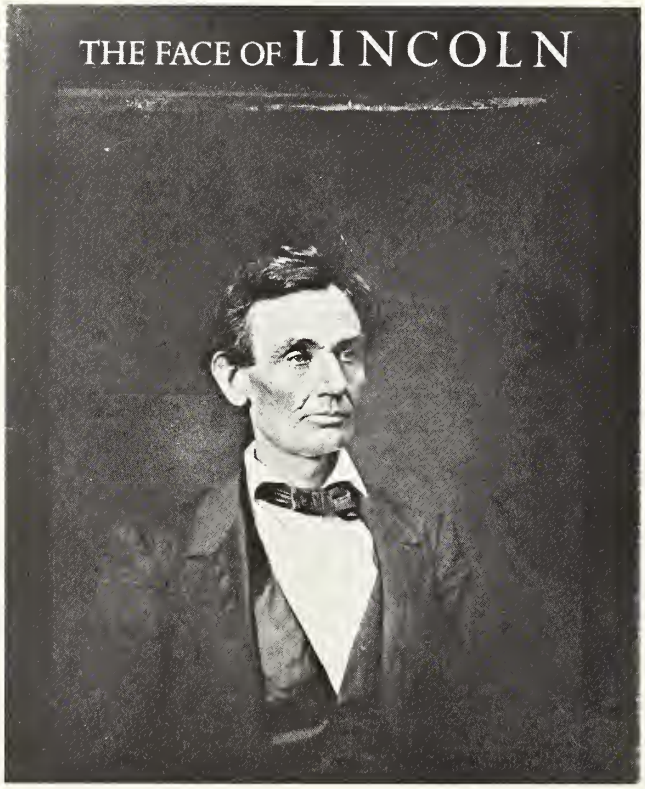
Lincoln Memorial University Press/(Device)/Fall, 1979/Vol. 81, No. 3/Lincoln Herald/A Magazine devoted to historical/research in the field of Lincolniana and/the Civil War, and to the promotion/of Lincoln Ideals in American/Education./ [Harrogate, Tenn.]

Pamphlet, flexible boards, 10⅛" x 7⅛", 141-220 pp., illus., price per single issue, $3.00.

LINCOLN MEMORIAL UNIVERSITY 1979-23

Lincoln Memorial University Press/(Device)/Winter, 1979/ Vol. 81, No. 4/ Lincoln Herald/A Magazine devoted to historical/research in the field of Lincolniana and/the Civil War, and to the promotion/of Lincoln Ideals in American/Education./ [Harrogate, Tenn.]

Pamphlet, flexible boards, 10⅛" x 7⅛", 221-284 pp., illus., price per single issue, $3.00.



MELLON, JAMES 1979-24

The Face Of/Lincoln/Compiled and Edited by/James Mellon/A Studio Book • The Viking Press • New York/[Copyright 1979 by Viking Penguin Inc. All rights reserved. First published in 1979 by The Viking Press.]

Book, cloth, 14¾" x 11 9/16", fr., 201 (7) pp., chapter identification in text, illus., price, $75.00. Autographed copy by author.

SOTHEBY PARKE BERNET INC. 1979-25

Sale Number 4315/Important Lincolniana/With Other American Historical/And Financial/Autograph Letters And Documents/The Roy P. Crocker Historical Document Collection/of the Lincoln Savings and Loan Association/ Sold By Order Of The Board Of Directors/Donald W. Crocker, President/Exhibition/Friday, November 23, 1979, to Tuesday, November 27 . . . /Galleries open . . . /and Monday . . . /Public Auction/Wednesday, November 28, 1979, at 10.15 a.m. and 2 p.m./Sotheby Parke Bernet Inc. 980 Madison Avenue, New York NY 10021/212-472-3400 Book Department: 472-3592/[Printed by Cosmos Press, New York City, New York. Published by Sotheby Parke Bernet Inc. Photographs by Sotheby Parke Bernet Photography Dept.]

Pamphlet, flexible boards, 9¼" x 8¾", (68) pp., illus.

STEWARD, BARBARA AND DWIGHT 1979-26

(Device) The (Device)/Lincoln/Diddle/by/Barbara and Dwight/Steward/William Morrow And Company, Inc./New York 1979 [Copyright 1979 by Barbara Steward and Dwight Steward. All rights reserved. First edition.]

Book, cloth, 8½" x 5¾", 251 (1) pp., price, $8.95.

LOUIS A. WARREN LINCOLN LIBRARY AND MUSEUM, THE 1979-27

Lincoln Lore/Bulletin of the Louis A. Warren Lincoln Library and Museum. Mark E. Neely, Jr., Editor./Mary Jane Hubler, Editorial Assistant. Published each month by the/Lincoln National Life Insurance Company, Fort Wayne, Indiana 46801./Number 1697, July 1979 to Number 1702, December 1979.

Folder, paper, 11" x 8½", 4pp., illus. Number1697, The Abraham Lincoln Association, July 1979; Number 1698, Jack Tar And Abe Lincoln: How The Sailors Voted In '64, August 1979; Number 1699, Lincoln's Springfield Friends: Friends Of The Negro, September 1979; Number 1700, The Last Life Portrait Of Lincoln, October 1979; Number 1701, Lincoln, The Mexican War, And Springfield's Veterans, November 1979; Number 1702, Index for 1979, December 1979.

1980

BURGESS, LARRY E., DR. 1980-1

Caught In The Middle:/Lincoln And The/Smith Brothers Case/By Dr. Larry E. Burgess, Archivist/Head Of Special Collections/A.K. Smiley Public Library/Redlands, California/(Three staggered portraits of: Sumner facing right, Lincoln facing right; and Welles facing left)/February 10, 1980/A Keepsake/Lincoln Memorial Shrine/Redlands, California/(Cover title)/[Printed at the Beacon Printery, Redlands, California.]

Pamphlet, paper, 8½" x 5 7/16", 7 (1) pp., printing on outside back cover. No. 262 of limited edition of 500 copies.

FARRAR, FLETCHER, JR. 1980-2

Illinois February 8-14, 1980 25¢/Times Downstate Illinois' Weekly Newspaper/Demythologizing Lincoln/The Illinoisan Nobody Knows/(Photograph of a Lincoln bust by Volk surrounded and admired by children)/Courtesy National Park Service/Volume 5, Number 20 Schoolchildren get a feel for Lincoln while park ranger Peter Gibbons looks on./What Should/Springfield/Tell Tourists?/P. 4/A Historian/On Myth &/A Great Man/P. 8/The Fight/Over Lincoln's/New Salem/P. 14/Would Lincoln join/the Abraham Lincoln Association?/P. 12/(Cover title)/[Copyright 1980 by Illinois Times Inc. All rights reserved. Reproduction in any form without permission prohibited.]

Pamphlet, paper, 16⅜" x 11⅜", 27 (1) pp., illus., price, $0.25.

ILLINOIS STATE HISTORICAL LIBRARY 1980-3

Illinois/History/Volume 33/Number 5/February 1980/Abraham Lincoln/To Rise in Life — Riding/the Eighth Circuit — By the/Light of the Moon — Lincoln,/the Politician — Arrival in/Galesburg — The Campaign/of 1860 — Three Minutes at/Gettysburg — Tried by the/Press — Minority President/(Illustration of bas-relief Pickett plaque)/Abraham Lincoln/(Cover title)/[Copyright 1980 by the Illinois State Historical Society. Published by the Illinois State Historical Library in cooperation with the Illinois State Historical Society, Old State Capitol. Springfield, Illinois 62706.]

Pamphlet, flexible boards, 9 15/16" x 7 1/4", 99-119 pp., illus., price, 25¢.

LINCOLN NATIONAL LIFE INSURANCE COMPANY (1980)-4

A Guide to/Starting a/Lincoln Library/(Caption title)/[Published in (1980) by the Lincoln National Life Insurance Company, Fort Wayne, Indiana 46801.]

Pamphlet, paper, 6 3/16" x 3 5/16", (12) pp., colored illustrations [one on inside back cover]. Form 16426.

Lincoln Lore

January, 1982

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Number 1727

THE INSANITY DEFENSE IN LINCOLN'S ILLINOIS

The recent verdict in the case of John W. Hinckley, Jr., has provoked a great outcry against the insanity defense. Indiana's "guilty but mentally ill" verdict, itself the product of the outraged aftermath of two recent successful insanity defenses in the state, has become the focus of national attention. Numerous journalists are discussing the virtues of placing the burden of proof on the defendant who claims insanity as a defense. The feeling is widespread, as Robert Coles said in *The New Yorker*, that "the law . . . has changed from what is once was," and people are worried about it.

There are many new things in the law, but the insanity defense is not one of them. Critics seem to think of it as a newfangled product of a degenerate age. The insanity defense is depicted as a dirty trick played on justice by a post-Freudian

Courtesy of National Collection of Fine Arts, Smithsonian Institution

FIGURE 1. Justice appears primitive in William Brickey's painting of a *Missouri Courtroom*. Yet in such surroundings sharp lawyers occasionally argued the insanity defense for their clients.

society incapable of telling right from wrong. In truth, the insanity defense is much older than Freudian psychology. It is an aged institution in American and English law. It was well established when Abraham Lincoln practiced law. He might have used it for his own clients, and he certainly saw it used in Illinois courtrooms. He never complained about its use, and the Illinois Supreme Court of Lincoln's day upheld the insanity defense and met some of the same arguments that are used against it today.

In June, 1855, a man name Isaac Wyant became embroiled in a street brawl over a land boundary dispute. One Anson Rusk shot Wyant in the arm. After the limb was amputated near the shoulder, Wyant murdered Rusk in the County Clerk's office in Clinton, Illinois, on October 12, 1855. He shot him four times in broad daylight and in the presence of several witnesses. In 1857 the case (The People *v.* Wyant) was tried in Bloomington, Illinois (March 31-April 5), on a change of venue. David Davis was the judge, and Lincoln aided the prosecution.

Wyant pleaded not guilty by reason of insanity. His sanity had been questionable long before the murder, and several doctors, including the Superintendent of the State Hospital for the Insane at Jacksonville, testified for the defense. Wyant was acquitted and became an inmate at Jacksonville for several years thereafter. He was eventually released on condition that he return to his native Indiana to stay.

Joseph E. McDonald met Lincoln and other lawyers when they were discussing the case in Danville. Lincoln "had made a vigorous fight for the prosecution" and was surprised to learn that Wyant was an old friend of McDonald's. McDonald had frequently represented him as his counsel in various scrapes in the past. Lincoln wanted to know all about the defendant, and McDonald filled him in. As the lawyers headed to the courthouse the next day, Lincoln told McDonald that he had been much disturbed by what he had learned about Wyant. He had had trouble sleeping, fearing that "he had been too bitter and unrelenting in his prosecution." "I acted," Lincoln said, "on the theory that he was 'possuming' insanity, and now I fear I have been too severe and that the poor fellow may be insane after all. If he cannot realize the wrong of his crime, then I was wrong in aiding to punish him."

Lincoln had learned his lesson. Within a few months of the Wyant trial, Robert Sloo of Shawneetown, Illinois, killed a man who had written a newspaper article critical of Sloo's father. The father had been running for a minor office and was a friend of Lincoln's. He wrote Lincoln to ask for help in his son's defense. Lincoln could not go, but he recommended the lawyer who had successfully defended Wyant. Sloo, too, was found not guilty by reason of insanity.

There may well have been other instances of Lincoln's involvement with the insanity defense, but the lack of a definitive edition of Lincoln's legal papers makes it impossible to tell. By examining the statements of the state supreme court in the period, however, one can gain an appreciation for the reasonable nature of the use of the insanity defense in Lincoln's Illinois.

On July 18, 1859, Wesley B. Fisher murdered his wife Clarissa, apparently in LaSalle, Illinois. In the ensuing trial, the attempt by defendant's counsel to prove his wife's infidelity was forbidden on objection from the prosecutor. When the defense "offered in evidence Chitty's Medical Jurisprudence, Shelford on Lunacy, Beck's Medical Jurisprudence, Taylor's Medical Jurisprudence, and Wharton's Medical Jurisprudence, for the purpose of throwing light on the indications or symptoms of insanity" in Fisher's case, the court refused to admit them in evidence.

In its instructions to the jury, the court stated:

> The law presumes every man to be sane until the contrary is shown, and when insanity is set up as a defense, by a person accused of crime, the jury should be satisfied, from all of the proofs in the case, that at the time of the commission of the crime his mind was so far affected with insanity as to render him incapable of distinguishing between right and wrong, in respect to the killing, or if he were conscious of the act he was doing, and knew its consequences, he was, in consequence of his insanity, wrought up to a frenzy which rendered him *unable* to control his actions or direct his movements.

There followed other controversial instructions which the Supreme Court was later to single out for special comment:

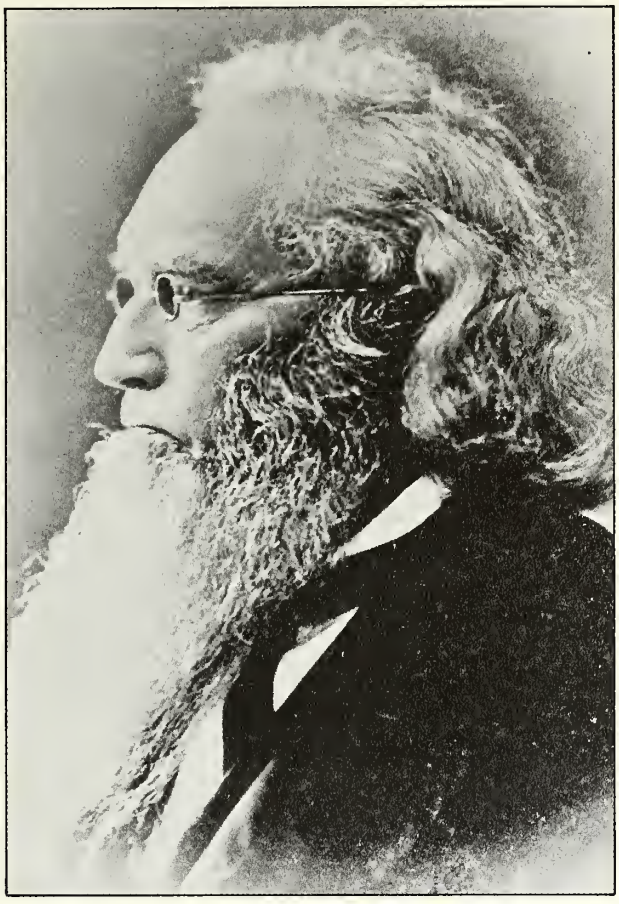
> 5th. In arriving at the conclusion whether the prisoner was sane or insane, at the time of the killing, the jury should begin with the presumption of the prisoner's sanity, and take into account all the evidence in the case of his previous history, habits and conduct, the circumstances immediately connected with the act of killing and his subsequent conduct and deportment, and unless the evidence preponderates in favor of his insanity at the time of the act, the jury cannot excuse the prisoner on the plea of insanity.
>
> 6th. Even if there should be evidence tending to show that the prisoner was insane, or affected with insanity previous to the act of killing, yet the question for the jury on this point is, whether he was insane at the time of the act complained of, and unless the jury are satisfied, from *all* the proof in the case, that the prisoner was insane *at the time of the act of killing*, they should not excuse him on that ground.
>
> 7th. Before the jury can be justified in rendering a verdict of acquittal on the ground of moral insanity, they must be satisfied by *clear* and *undoubted proof* that the accused was acting under an uncontrollable impulse, a frenzy which rendered him unable to control his actions or direct his movements, and not in a spirit of revenge for real or imagined wrong.
>
> 9th. The prosecution are not bound to prove that the defendant was sane at the time of the act complained of, and if the whole evidence in the case should leave it doubtful in the minds of the jury whether the prisoner was sane or insane at the time, they should not in that case excuse the prisoner on the ground of insanity.

These instructions came very close to putting the burden of proof on the defendant.

The Fisher case was a remarkable one not only because of the court's controversial instructions to the jury but also because the defense attempted what might be called an "insanity mitigation" of the crime as well as a traditional insanity defense. Counsel for the defense asked the court to instruct the jury thus:

> Although the prisoner may not have been so insane as to excuse him entirely, yet, in determining whether at the time of the killing he acted without deliberation, and under the influence of such a sudden and irresistible passion as would reduce the grade of the offense from murder to manslaughter, it is proper for the jury, if they believe that the same provocation would arouse such a sudden and irresistible passion in his mind, if so affected by jealousy, when it would not have aroused it if he had not been jealous, to take into consideration the fact, if proven, that he was jealous, in determining the degree and extent of the passion which existed at the time of the killing.
>
> . . . Although the prisoner may not have been so insane as to excuse him entirely, yet in determining whether at the time of the killing he acted without deliberation, and under the influence of such a sudden and irresistible passion as would reduce the grade of the offense from murder to manslaughter, it is proper for the jury, if they believe that the same provocation would arouse such a sudden and irresistible passion in his mind, if so affected by drunkenness, when it would not have aroused it if he had not been affected with drunkenness, to take into consideration the fact, if proven, that he was affected with drunkenness, in determining the degree and extent of the passion which existed at the time of the killing.

The jury was perplexed by the complicated instructions and



From the Louis A. Warren Lincoln Library and Museum

FIGURE 2. Sidney Breese.

asked for clarification from the court. One juror even asked whether it was "lawful for a juryman to go behind our statute law and search the Bible to see whether our statute laws are not void in consequence of their disagreement with the higher law." The jury also wanted to know whether it was "lawful for a juror to go behind the testimony and read medical books to see whether the doctors and others examined on the trial testified correctly or not." The court directed the jury to be governed by Illinois's statutes and by the sworn testimony in the case, not by the Bible and medical books.

Further questions poured from the jury room. Could a juryman "go behind the instructions of the court and search law books for the purpose of finding some error in said instructions"? No, responded the judge, "It is not the law that the jury can go outside of the case, as given to them by the testimony and the instructions of the court, and determine for themselves whether the law, as given to them, is or is not the law." In a final bizarre question, the foreman asked:

> Is it lawful for a juror, after admitting the proof of every essential fact which constitutes a certain crime, to bring in a different verdict, because he, the said juror, does not approve of the penalty attached to the first.
>
> If so, how long must we remain in this worse than purgatory, and be abused and villified by a fanatical *madman.*

The court said no. The judge believed firmly that the jury "must take the instructions, as they receive them from the court, to be the law by which they are to be governed in the case."

After several days of deliberation, the foreman of the jury told the judge that there was little likelihood the jury would ever reach agreement and asked him to discharge them. The judge refused, saying "that before the next term of this court, the witnesses may be in their graves, and justice may be cheated of its victim." Again, the defense objected, as it had to several of the judge's statements. The jury finally found Fisher guilty, and the defense appealed the verdict.

The Supreme Court entertained the idea of rejecting the verdict because of the "loose and disconnected manner" in which the record of the trial was made up but decided not to because the case involved the life of an individual. In the April term of the Supreme Court, 1860, Justice Sidney Breese delivered the court's opinion.

The Supreme Court found little fault with most of the instructions given to the jury or with the lower court's refusal to instruct the jury as the defense requested.

> The jury [Breese wrote], in all cases where such a defense is interposed, should be distinctly told that every man is presumed to be sane, until the contrary is shown — that is his normal condition. Before such a plea can be allowed to prevail, satisfactory evidence should be offered that the accused, in the language of the criminal code, was "affected with insanity," and at the time he committed the act, was incapable of appreciating its enormity. This rule is founded in long experience, and is essential to the safety of the citizen. Sanity being the normal condition, it must be shown, by sufficient proof, that from some cause, it has ceased to be the condition of the accused.

The Supreme Court thus appeared to endorse the idea that the burden of proof was on the defendant who used the insanity defense.

With one of the lower court's instructions, however, Justice Breese took sharp exception:

> Section 188 of the criminal code, (Scates' Comp. 408,) declares in the most pointed and emphatic language, that "Juries, in all cases, shall be judges of the law and the fact." This power is conferred in the most unqualified terms, and has no limits which we can assign to it. We have said, in the case of *Schneir* v. *The People, ante*, p. 17, that, being judges of the law and the fact, they are not bound by the law, as given to them by the court, but can assume the responsibility of deciding, each juror for himself, what the law is. If they can say, upon their oaths, that they know the law better than the court, they have the power so to do. If they are prepared to say the law is different from what it is declared to be by the court, they have a perfect legal right to say so, and find the verdict according to their own notions of the law. It is a matter between their consciences and their God, with which no power can interfere. There can be no apprehension of oppression to the citizen in so looping this power, for an erroneous decision of the jury against a prisoner can be corrected by the power remaining in the court to award a new trial. The jury were not bound to take the law as "laid down" to them by the court, but had the undoubted right to decide it for themselves, and in refusing so to declare, the court erred.

Justice Breese also thought that the instruction requested by the defense which might have reduced the crime to manslaughter should have been given to the jury.

Thus Illinois's highest tribunal was quite willing to admit a consideration which had a tendency to "psychologize the crime away," as the modern saying goes. On the other hand, it appeared to place the burden of proof in a case involving the insanity defense on the defendant.

The Supreme Court of Illinois clarified their views on the tangled question of the insanity defense in a decision handed down while Lincoln was President. In Hopps *v.* The People, decided in the court's April term in 1863, Justice Breese himself altered what he seemed to have said in the Fisher case, stating flatly and clearly: "When a defendant who is being tried upon a criminal charge, sets up insanity as an excuse for the act, he does not thereby assume the burthen of proof upon that question. Such a defense is only a denial of one of the essential allegations against him." He added, tellingly: "And in sustain-

ing such a defense, it is not necessary that the insanity of the accused be established even by a preponderance of proof; but if, upon the whole evidence, the jury entertain a reasonable doubt of his sanity, they must acquit." Breese frankly acknowledged the error in his previous decision:

> The rule here announced, differs from that laid down in *Fisher's case,* 23 Ill. 293. In that case we said, sanity being the normal condition, it must be shown by sufficient proof, that from some cause, it has ceased to be the condition of the accused. The opinion in that case, was prepared under peculiar circumstances not admitting of much deliberation, and this point was not pressed upon the attention of the court, or argued at length. Further reflection has satisfied us, it was too broadly laid down, and that justice and humanity demand, the jury should be satisfied, beyond a reasonable, well-founded doubt, of the sanity of the accused. The human mind revolts at the idea of executing a person whose guilt is not proved, a well-founded doubt of his sanity being entertained by the jury.

Chief Justice John Dean Caton filed a separate opinion, upholding the same point. "Is it any less revolting," he asked, "to an enlightened humanity to hang an innocent crazy man than one who is sane?" The "all-pervading sentiment of civilized man" demanded the "general rule in all criminal trials, that if, from the whole evidence, the jury entertain a reasonable doubt, it is their duty to acquit; and the reason is, that it is better that many guilty persons should be acquitted, than that one innocent person should be convicted."

Justice Pinkney H. Walker filed a partially dissenting opinion. "The plea of insanity," he argued, "like all other special pleas, confesses the act charged and avoids its consequences, by showing circumstances which establish a defense." It seemed logical that "the proof must devolve upon the party interposing the defense." Reasonable doubt of the defendant's sanity was not enough to cause acquittal. The rule announced in the Fisher case, though "not the uniform rule of the American courts," was the rule of "a large majority" of them, Walker said. It was a rule "well calculated to protect community against the perpetration of crime."

Caton and Breese represented the majority of the court, and the verdict in the Hopps case was reversed (Hopps had murdered his wife and had been found guilty).

Over a hundred years ago, Illinois law upheld the insanity defense. After an awkward start, its highest tribunal ruled that the burden of proof was on the prosecution and that a reasonable doubt of the defendant's sanity dictated an acquittal. "Sanity is guilt," said Justice Breese, "insanity is innocence; therefore, a reasonable doubt of the sanity of the accused, on the long and well-recognized principles of the common law, must acquit." Lincoln's was not a simpler era because it was an earlier era. The judges and lawyers faced the same difficulties that modern judges and lawyers do: conflicting testimony from expert medical witnesses, considerable disagreement among medical authorities who wrote on insanity, awareness that defendants could "possum" insanity, and the all-important necessity to balance the safety of the community against the sanctity of an individual's life and liberty.

Breese admitted that writers on the subject "furnish, as yet, no true and safe guide for courts and juries." Pinkney Walker knew "that there are few questions which present greater difficulties in their solution, than this of insanity. It assumes such a variety of forms, . . . that it has almost been denied, that any person is perfectly sane, on every subject." In a hotly contested case, one Justice noted, "One of the physicians, . . . states that, from complainant's evidence, he thinks it difficult to tell whether Waggoner was sane or insane. . . . The other physician gives it, as his opinion, that he was insane." Caton knew that "insanity may be simulated," but "So may any other fictitious defense be got up to screen the guilty." None of these difficulties challenged the place of the insanity defense as far as Illinois's greatest lawyers in Lincoln's era were concerned.

They were aware, of course, that they dealt with a "science" as yet in its infancy. "To say that men by careful study and investigation," Caton argued, "can acquire no skill on this subject, while the same study and investigation will constantly develop new truths on all other subjects, would be a daring assumption upon which we cannot consent to hang a fellow man." Breese, too, upheld the insanity defense even though he knew that science as yet offered "no true and safe guide for courts and juries." He hoped that someday a rule would be established which, "whilst it shall throw around these poor unfortunates a sufficient shield, shall, at the same time, place no great interest of community in jeopardy."

That day never came — all the more reason that modern Americans should look to the past for guidance when examining the fundamental parts of their legal system.

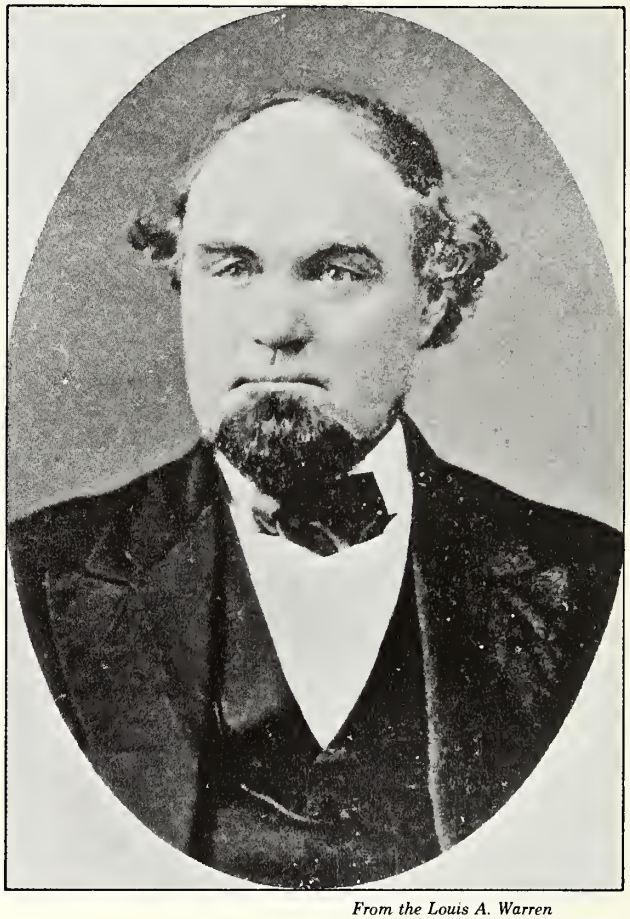


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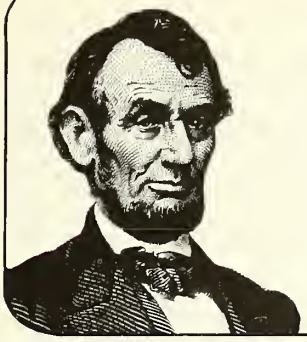
FIGURE 3. Pinkney H. Walker.

JAMES ANTHONY MUDD

Dr. Richard Mudd, who watches out for the reputations of his ancestors, noted that the James Mudd referred to in *Lincoln Lore* Number 1721 must have been James Anthony Mudd, Dr. Samuel A. Mudd's older brother. "Jim" Mudd was born in Bryantown, Maryland, in 1829. He lived in or near Bryantown most of his life, moving to Baltimore in the 1880s. During the Civil War, he was a farmer. He was drafted, but his family paid for a substitute.

Richard Mudd's useful book, *The Mudd Family of the United States,* does not mention James Mudd's pro-Confederate activities, but the doctor assures us that he learned about them too late to include mention in the first edition of his book. "Jim" Mudd's wife, Emily, testified in Dr. Samuel A. Mudd's behalf at the trial of the alleged conspirators in Abraham Lincoln's assassination.



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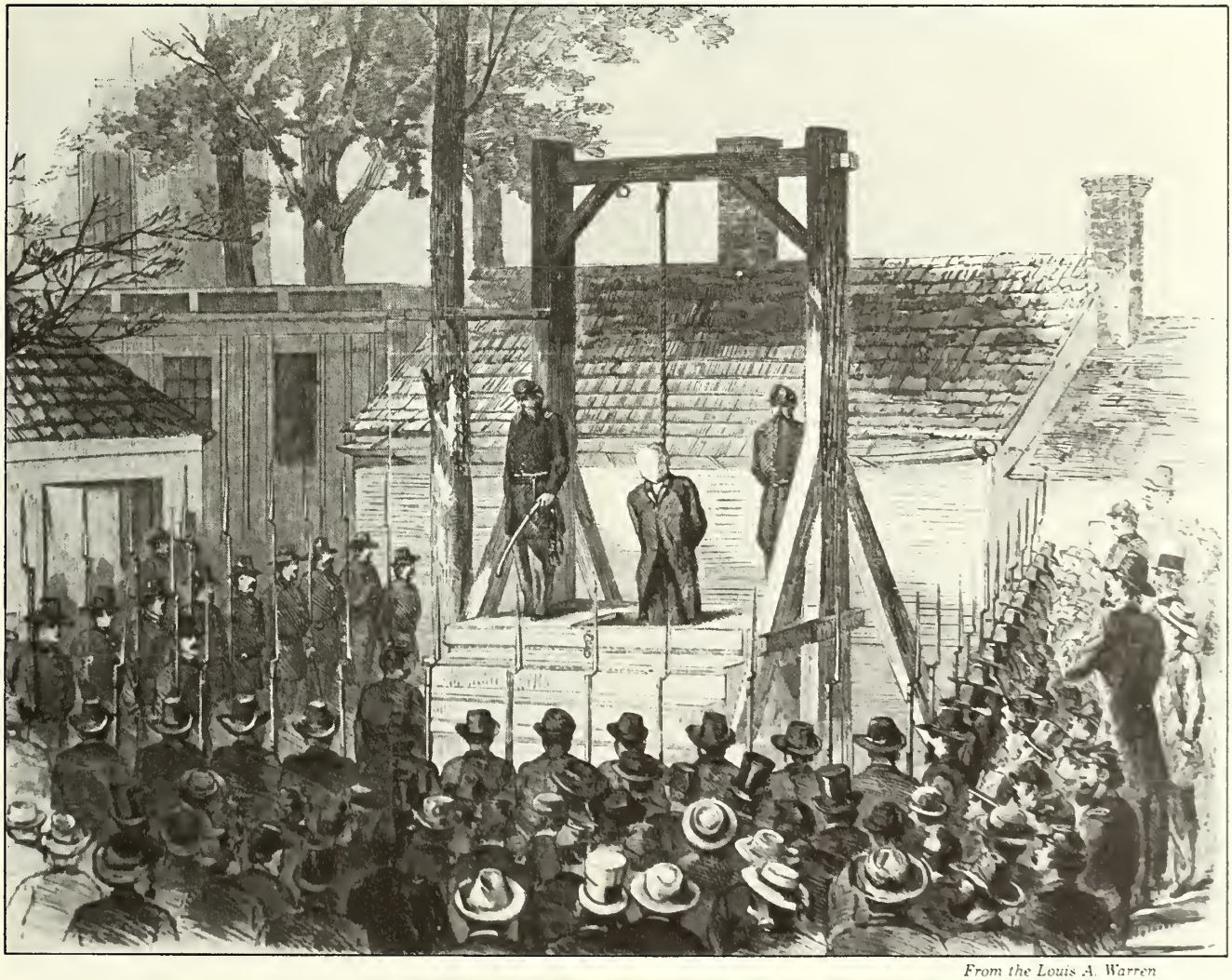
Number 1728

President Lincoln and the Insanity Defense

The preceding issue of *Lincoln Lore* showed that Abraham Lincoln, as a lawyer in Illinois, was quite familiar with the insanity defense. He lost the Wyant case when Leonard Swett successfully invoked the insanity defense for his client, and he soon thereafter recommended Swett to a friend in need of a lawyer to argue the insanity defense for his son.

When he became President of the United States, Lincoln did not leave such criminal matters behind him and devote his energies entirely to war and emancipation. Criminal justice was still an occasional concern for Lincoln because of the President's pardoning power. In such cases as came to his attention as President, Lincoln carefully saw to it that defendants of questionable mental health were provided the opportunity to prove that their mental condition absolved them of responsibility for their crimes.

On August 3, 1863, Lincoln wrote Major General John G. Foster at Fort Monroe, Virginia, instructing him to send him the transcript of the trial of Dr. David M. Wright, if the doctor "has been, or shall be convicted." Within the week, Lincoln received a letter from Senator Lemuel J. Bowden, representing the loyal government of Virginia, asking the President to let him know when the transcript was received. Bowden wanted Lincoln then to fix a day when he and other Virginians "may appear before you and present the mass of testimony which has



From the Louis A. Warren Lincoln Library and Museum

FIGURE 1. Hangings of civilians sentenced to death by military commissions were not uncommon in slave states.

been taken to prove the insanity of Doctor Wright, and also to present such statements in regard to the manner of conducting his trial, and to the facilities afforded him for making anything like a fair defense, as the facts of the case will justify." On the 28th Lincoln was "ready to hear them."

The gentlemen from Virginia apparently came to Washington right away, and what they told Lincoln must have been something like this. David M. Wright was a respected physician who had practiced in Norfolk, Virginia, since 1854. Born in North Carolina, he was a medical graduate from the University of Pennsylvania. He had a son in the Confederate service from whom he had not heard since the Battle of Gettysburg, July 1-3, 1863. On July 11th at 4:00 in the afternoon, Dr. Wright encountered Lieutenant Anson L. Sanborn on Main Street in Norfolk. The lieutenant was marching at the head of a column of the First U.S. Colored Volunteers. Wright ran to his home, got a pistol, and insulted the lieutenant. Sanborn declared the doctor under arrest, and Wright shot him twice at point-blank range. Sanborn died and the provost marshal arrested Wright. He was tried by a military commission which refused to allow an insanity defense, despite evidence that Dr. Wright was noted for giving very peculiar prescriptions for his patients, that he was under the strain of worry about his son, and that his very moderate political views were inadequate to account for his sudden decision to murder the leader of some black troops in Virginia. The commission convicted him of murder and sentenced him to hang.

President Lincoln was not about to condone an execution prescribed by a military commission which followed no prescribed laws and which denied the defendant one of the standard protections of the law. He thought immediately of getting Dr. Charles H. Nichols of the Government Asylum for the Insane, in Washington, to review the case, but Secretary of State William H. Seward informed the President on September 2nd that Nichols's "surroundings are so disloyal as to shake public confidence in himself." Seward recommended Dr. John P. Gray of Utica, New York, instead.

William H. Seward had a commendable record on issues involving insanity. As early as 1843, his interest in the plight of the insane was well enough known that Dorothea Lynde Dix, the famous reformer, came to Auburn, New York, Seward's home town, to seek advice on her campaign to improve the treatment of the mentally ill. In 1846 he defended Henry Wyatt, a Negro accused of murder, on the grounds that he was insane. He lost the case, and Wyatt was sentenced to hang. He also defended a more sensational murderer, William Freeman, also a Negro, who slayed four people in an innocent farmer's home in 1846. Seward also invoked the insanity defense in this case, and he and the opposing counsel, Democratic politician John Van Buren (son of the President), called numerous doctors to testify. The jury found Freeman guilty. The New York Supreme Court later overturned both verdicts.

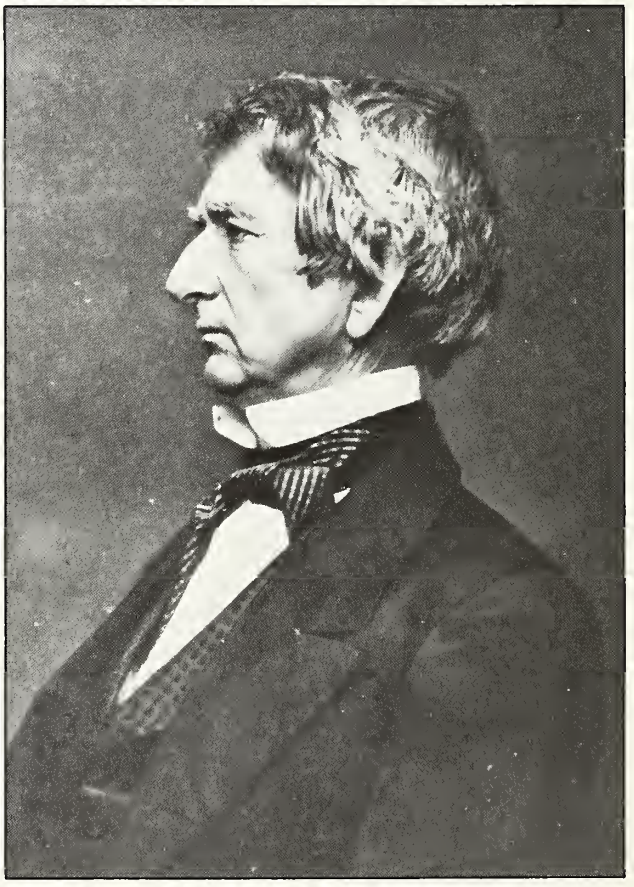
Dr. John P. Gray was one of the most eminent specialists in mental medicine in the country. Seward knew him as the Superintendent of the Utica State Asylum and consultant to the state asylum for the criminally insane in Auburn, but he was also editor of the *American Journal of Insanity,* the official organ of the nineteenth-century equivalent of the American Psychiatric Association. He frequently testified in trials involving persons who claimed to be insane.

On September 10th President Lincoln assigned Dr. Gray his duties in the Wright case. The doctor was to go to Fort Monroe "and take in writing all evidence which may be offered on behalf of Dr. Wright and against him, and any, in addition, which you may find within your reach, and deem pertinent; all said evidence to be directed to the question of Dr. Wright's sanity or insanity, and not to any other questions; you to preside, with power to exclude evidence which shall appear to you clearly not pertinent to the question." The key phrase may well have been "you to preside"; Lincoln was giving this case strictly a civilian review. He did not want to follow the rules of a military commission. The commanding officer at Fort Monroe was to have an officer present to act "as Judge Advocate or Prossecuting Attorney," but otherwise he was to assist Gray and be sure to notify Senator Bowden or one of his Virginia associates.

Dr. Gray called thirteen witnesses for Wright and thirteen for the government, and he interviewed Dr. Wright for about two hours. He learned a great deal about this curious murderer. As a boy, Wright had had a horror of blood and could not shoot birds; yet he became a physician. Early in his life, he had rather Northern ideas about slavery, especially for a man born and raised in North Carolina. He owned a few slaves himself but allowed them to select new masters and sold all of them.

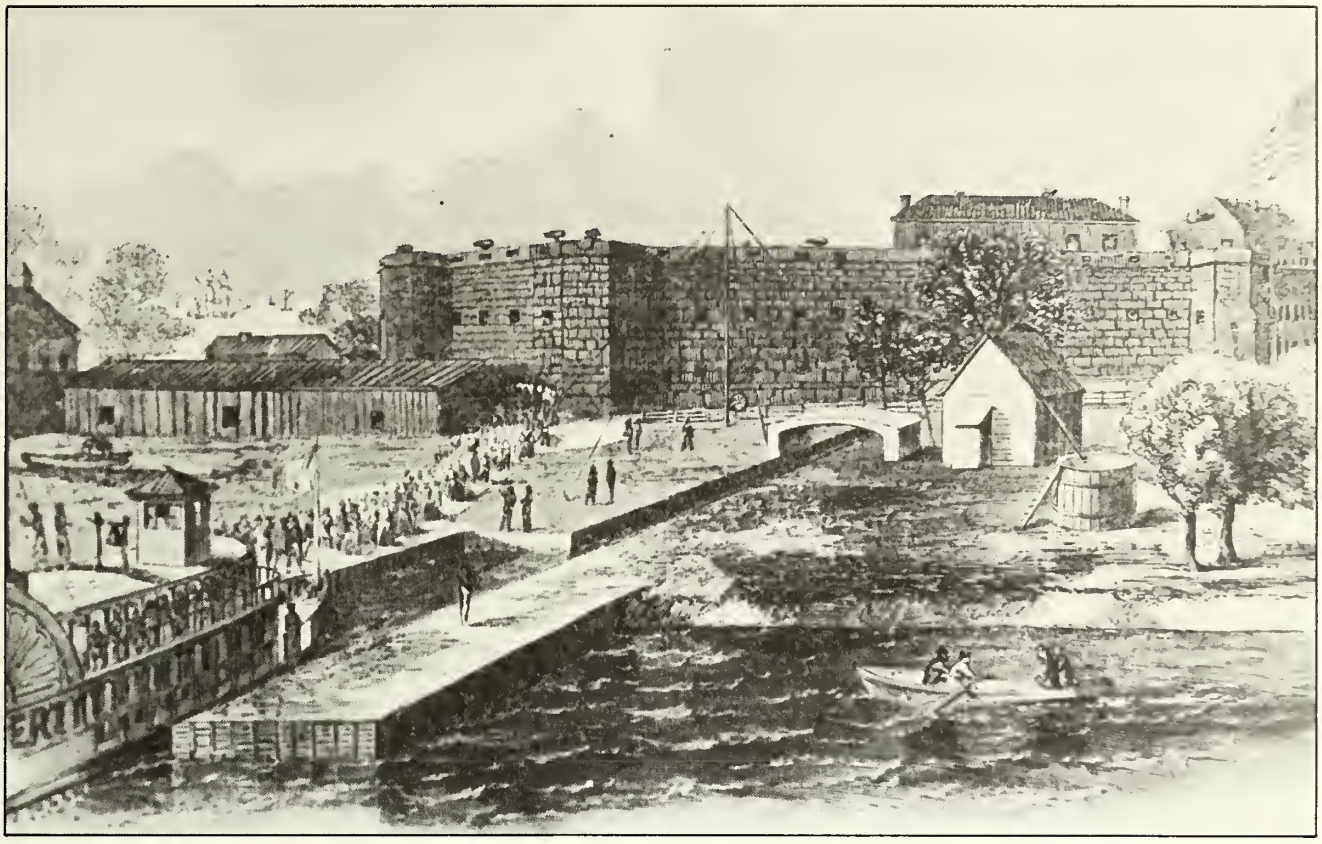
Later, Dr. Wright changed his mind, deciding that slavery was in accordance with the scriptures and best suited the true welfare of the black race. He had Negro servants by the time of the Civil War and a farm in North Carolina which was worked by slaves. He was consistently kind to his servants. When, because of the proximity of Federal troops, most servants were leaving their masters, Dr. Wright called his together, told them he could not really blame them for wanting to leave, and said that any who did not fare well on their own could come back to him. He had an agent give his superannuated housekeeper meat twice a week until she could maintain herself financially. His slaves in North Carolina chose to remain on the plantation as slaves.

In politics, Dr. Wright had been a Whig and was thought of in the 1850s as a Union man. Gradually he became more Southern in feeling and eventually voted for Virginia's secession, claiming that the act would save the Union by restoring it to its proper basis. When the Yankees took Norfolk, he counselled "dignified non-intercourse, and abstaining from all violence." He kept at his practice and showed no particular animosity toward black soldiers, though he thought arming the Negroes a great wrong.



From the Louis A. Warren Lincoln Library and Museum

FIGURE 2. William H. Seward was among the most celebrated lawyers of Lincoln's day. His defenses of black clients should be famous not only for the color of the client but also for the use of the insanity defense.



From the Louis A. Warren Lincoln Library and Museum

FIGURE 3. Fort Delaware was one of the infamous "Bastilles of the North." Along with the occasional newspaper editors and Democratic politicians, they usually contained deserters, spies, blockade runners, and a few lunatics.

Dr. Wright had been on the way home to prepare for his daily patient visitation when he saw Lieutenant Sanborn and his black soldiers. He was seized with an "uncontrollable impulse" to kill Sanborn. After the deed was done, Dr. Wright attempted to help Sanborn medically and apparently expressed a wish that the soldiers would bayonet him for his deed.

Wright was not a church member, but he had long read prayers to his family. After his incarceration, he was baptised and received in the church.

Dr. Gray decided that Wright may have acted under an "uncontrollable" impulse but not under an insane impulse. He noted that a government chemist found nothing bizarre about the doctor's prescriptions. Gray cited the facts that Wright had no hallucinations and no previous symptoms of insanity as evidence that the murder was a deliberate act. And Dr. Gray stated flatly that latent insanity which suddenly appears does not disappear immediately after the first insane act. Dr. Wright had appeared perfectly sane in his interview with Gray and throughout his confinement after the crime.

On October 23, 1863, David M. Wright was hanged. President Lincoln had done all he could.

It was not the last time Lincoln would consult Dr. Gray. On March 7, 1864, the President received the papers on the court martial of Lorenzo C. Stewart (alias Shear), a private in the Fourteenth New York Artillery. Stewart had been convicted of desertion and murder (poisoning soldiers). Lincoln asked Judge Advocate General Joseph Holt for a report on the case and on April 14th approved the execution, which was to occur on the 22nd. A petition for clemency from citizens of Elmira, New York, was apparently received in Washington on the 14th. It must have alleged insanity as a mitigating factor, and Lincoln apparently postponed the execution. On the 25th he wrote Dr. Gray again.

President Lincoln gave Gray precisely the same instructions he had given in the previous case, The result for Private Stewart was different, however. On January 25, 1865, Lincoln commuted his sentence to imprisonment in the penitentiary at hard labor for ten years.

On his last birthday, President Lincoln again considered insanity as a mitigating factor in the case of a man sentenced by court martial, or, more likely, military commission. Dr. Edward Worrell, a citizen of Delaware, had been sentenced to imprisonment for one year for aiding a prisoner to escape from Fort Delaware, one of the notorious "Bastilles of the North." The records are fragmentary, but, apparently, on evidence presented by Judge George P. Fisher that Dr. Worrell was "partially insane," Lincoln had him discharged from Fort Delaware.

Abraham Lincoln was a good lawyer and a humane man, but he was not a philosopher of jurisprudence. He sought justice in the practical ways defined by existing laws. The insanity defense was a part of the legal system within which he practiced as an attorney and which he administered as President. With considerable vagueness and without, as yet, a great deal of philosophical exegesis, that legal system recognized the injustice, as William H. Seward put it in his rare eloquence in defense of William Freeman, "of trying a maniac as a malefactor." Lincoln, as his law partner William H. Herndon recalled, "was a very patient man generally, but if you wished to be cut off at the knee, just go at Lincoln with abstractions, glittering generalities, indefiniteness, mistiness of idea or expression." He "never undertook to fathom the intricacies of psychology," and applied "his powers in the field of the practical." Common sense told him that insane acts were innocent acts. As a lawyer he embraced the insanity defense when it seemed proper. He had more power as President, and he supplied an insanity defense when courts failed to. There was no other way to serve the cause of justice properly.

CUMULATIVE BIBLIOGRAPHY 1981-1982

by Mary Jane Hubler

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1981

COX, LaWANDA **1981-20**

Lincoln/and Black Freedom:/A Study in Presidential Leadership/by LaWanda Cox/(Device)/University of South Carolina Press/[Copyright 1981 by the University of South Carolina. Published in Columbia, South Carolina, by the University of South Carolina Press. First edition.]

Book, cloth, 9 1/4" x 6 3/16", xiii p., 254 (5) pp., price, $17.95.

LINCOLN MEMORIAL UNIVERSITY **1981-21**

Lincoln Memorial University Press/(Device)/Winter 1981/Vol. 84, No. 3/Lincoln Herald/A Magazine devoted to historical/research in the field of Lincolniana and/the Civil War, and to the promotion/of Lincoln Ideals in American/Education./[Harrogate, Tenn.]

Pamphlet, flexible boards, 10 1/16" x 7 1/8", 757-822 (2) pp., illus., price per single issue, $5.00.

1982

ANDERSON, DWIGHT G. **1982-1**

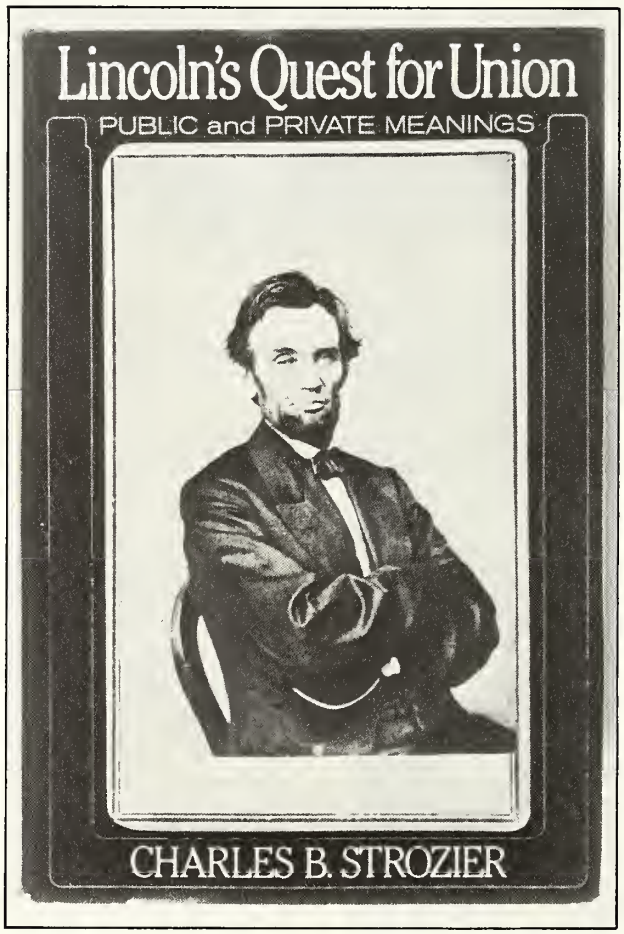
Abraham Lincoln/The Quest for Immortality/by/Dwight G. Anderson/(Device)/Alfred A. Knopf/New York 1982/[Copyright 1982 by Dwight G. Anderson. All rights reserved under International and Pan-American Copyright Conventions. First edition.]

Book, cloth and hardboards, 8 5/8" x 5 7/8", viii p., 271 (9) pp., price, $16.95.

BURGESS, LARRY E., DR. **1982-2**

The Lincoln Memorial Shrine/Golden Jubilee: / History Looking To Future / By Dr. Larry E. Burgess, Archivist/Head Of Special Collections/A.K. Smiley Public Library/Redlands, California/(Illustration)/The Lincoln Memorial Shrine as it appeared shortly after its dedication,/February 1932. Note the absence of the later "fountain wings." / Photo by Floyd Faxon / February 7, 1982 / A Keepsake / Lincoln Memorial Shrine / Redlands, California/(Cover title)/[Printed at the Beacon Printery, Redlands, California.]

Pamphlet, paper, 8 1/2" x 5 7/16", 12 pp., printing on outside back cover. Copy No. 421 of limited edition of 500 copies.



DANIEL F. KELLEHER CO., INC. **1982-3**

553rd Sale/Photos March 11, 1982/Autograph Letters, Documents And Signed Photos/Featuring Abraham Lincoln/(Illustration featuring four Abraham Lincoln signed carte-de-visite photographs)/Daniel F. Kelleher Co., Inc./(Cover title)/[Published by Daniel F. Kelleher Co., Inc., Stanley J. Richmond, Prop., Boston, Massachusetts 02109.]

Book, paper, 9 3/8" x 6 1/2", 94 (1) pp., illus., entire contents are illustrated, featuring 151 special sale items of 345 sale items from the collection of George Pollock, Beverly Hills, California.

DANIEL F. KELLEHER CO., INC. **1982-4**

553rd Sale/March 11, 1982/Autograph Letters, Documents And Signed Photos/Featuring Abraham Lincoln/(Illustration featuring four Abraham Lincoln signed carte-de-visite photographs)/Daniel F, Kelleher Co., Inc./(Cover title)/[Published by Daniel F. Kelleher Co., Inc., Stanley J. Richmond, Prop., Boston, Massachusetts 02109.]

Pamphlet, paper, 9 7/16" x 6 5/8", 40 pp., entire text contains descriptive data on 345 sale items and suggested price listings along with information on the auction and bid sheets from the collection of George Pollock, Beverly Hills, California.

FARRAR, FLETCHER, JR. **1982-5**

Living history hassles at New Salem P. 3/Robert Lincoln and the plot to steal Abe's bones P. 6/Why the Lincoln Home area is like a model train set P. 13/February 11-17, 1982/Vol. 7, No. 22/Illinois/Times/Downstate Illinois' Weekly Newspaper/Looking at the Legacy/Our annual Lincoln issue/(Illustration)/(Cover title)/[Copyright 1981 by Illinois Times, Inc. All rights reserved. Reproduction in any form without permission is prohibited.]

Pamphlet, paper, 15" x 11 1/4", 27 (1) pp., illus., price, $0.25.

ILLINOIS STATE HISTORICAL LIBRARY **1982-6**

Illinois/History/Volume 35/Number 5/February 1982/Abraham Lincoln/(Illustration)/Preparing for Politics in/New Salem — Support from/the Press — Lincoln's Use/of Power — Abraham Lincoln/as a Congressman — Guests/at Ford's Theatre — Duel/with James Shields — The/Stuart-Lincoln Law Firm/Lincoln and the Slavery Issue/(Cover title)/[Copyright 1982 by the Illinois State Historical Society. Published by the Illinois State Historical Library in cooperation with the Illinois State Historical Society, Old State Capitol, Springfield, Illinois 62706.]

Pamphlet, flexible boards, 9 15/16" x 7 1/4", 100-119 (1) pp., illus., price, 25¢.

McFARLAND, HENRY B. **1982-7**

Abe Lincoln — Attorney/New Jersey Law Journal,/109 N.J.L.J. Index Page 115/Thursday, February 11, 1982 / (Cover title) / [Offprint from the *New Jersey Law Journal*, 1982.]

Pamphlet, paper, 8 1/2" x 5 1/2", (4) pp.

MITGANG, HERBERT **1982-8**

(Portrait)/Mister Lincoln/A drama in two acts/By Herbert Mitgang/Southern Illinois University Press / Carbondale and Edwardsville / [Copyright 1982 by Herbert Mitgang. All rights reserved. No part of this book may be reproduced in any form or by any means, . . . without permission in writing from the copyright owner.]

Brochure, cloth, 8 1/4" x 6 1/8", x p., 52 (2) pp., price, $7.50.

NEELY, MARK E., JR. **1982-9**

The/Abraham Lincoln/Encyclopedia/Mark E. Neely, Jr./McGraw-Hill Book Company/New York St. Louis San Francisco Auckland/Bogota Hamburg Johannesburg London/Madrid Mexico Montreal New Delhi/Panama Sao Paulo Singapore/Sydney Tokyo Toronto/[Copyright 1982 by McGraw-Hill, Inc. All rights reserved. Except as permitted under the Copyright Act of 1976, no part of this publication may be reproduced or distributed in any form or by any means, . . . , without the prior written permission of the publisher. Published by McGraw-Hill Book Company, New York, New York. First edition.]

Book, cloth, 11 1/4" x 8 5/8", xii p., 356 pp., illus., price, $45.00. Autographed copy by author.

STROZIER, CHARLES B. **1982-10**

Lincoln's/Quest/For Union/Public and/Private Meanings/Charles B. Strozier/Basic Books, Inc., Publishers/New York/[Copyright 1982 by Basic Books, Inc. Designed by Vincent Torre.]

Book, cloth, 9 7/16" x 6 1/4", xxiii p., 271 (6) pp., illus., price, $17.50.

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